

Pleural Plaques

Consultation Paper CP 02/08

Published on 13 October 2008

This consultation will end on 12 January 2009

Pleural Plaques

This consultation exercise is being conducted by the Department of Finance and Personnel.

This paper is also available on the Department of Finance and Personnel's website: www.dfpni.gov.uk

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GLOSSARY OF TERMS

Asbestosis is a non-malignant scarring of the lung tissue which impairs the elasticity of the lungs, restricting their expansion and hampering their ability to exchange gases. This leads to inadequate oxygen intake to the blood.

Mesothelioma is an asbestos-related cancer which affects the mesothelium, the protective lining which covers most of the body's internal organs.

The pleura is a two-layered membrane which surrounds the lungs and lines the inside of the rib cage.

Pleural plaques are small localised areas of fibrosis found within the pleura.

Pleural thickening is a non-malignant disease in which the lining of the pleura becomes scarred. If it is extensive it can restrict the expansion of the lungs and lead to breathlessness.

Executive summary

This consultation paper, which is partly based on a corresponding paper produced in England and Wales by the Ministry of Justice¹, considers the House of Lords' decision in *Johnston v NEI International Combustion Ltd* and conjoined cases (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd* (and conjoined cases)).

In a unanimous decision on 17 October 2007, the Law Lords upheld a Court of Appeal decision in England and Wales that the existence of pleural plaques does not constitute actionable or compensatable damage. Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. Earlier decisions had established that it was possible for damages to be awarded for negligent exposure to asbestos which had led to the presence of pleural plaques. However, following the decision in *Johnston v NEI International Combustion Ltd*, this is no longer possible.

This paper considers the law and medical evidence underpinning the House of Lords' decision and developments around the decision in Great Britain.

It is recognised that each of the options discussed in this paper presents difficulties, which would have to be satisfactorily resolved before we agree the way forward.

We are keen to hear from as many people as possible and would encourage anyone with an interest to let us have their views. It would be extremely helpful if responses to the consultation questions could be submitted as early as possible during the consultation period.

¹ The paper produced by the Ministry of Justice can be viewed at <http://www.justice.gov.uk/docs/cp1408.pdf>. This paper also refers to information which is contained in documents prepared on behalf of the Scottish Executive, including the Regulatory Impact Assessment for the Damages (Asbestos-Related Conditions)(Scotland) Bill

Introduction

Pleural plaques are small localised areas of fibrosis found within the pleura of the lung caused by asbestos exposure. They do not usually cause significant symptoms (if any) and do not impair lung function. Although pleural plaques are, in themselves, benign, they are a marker of exposure to asbestos.

This paper considers the House of Lords decision in *Johnston v NEI International Combustion Ltd* and conjoined cases (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd* (and conjoined cases)) on pleural plaques. The consultation is aimed at the legal profession, trade unions, insurers, asbestos support groups and others with an interest in this issue in Northern Ireland.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 63, have been followed.

At this stage, a separate Impact Assessment for Northern Ireland has not been completed. However, the Impact Assessment which was prepared for England and Wales is set out in Annex A at page 36. That Assessment suggests that people diagnosed with pleural plaques, their employers and former employers (including Government), and insurers are likely to be particularly affected by a change in policy. The Assessment also shows that the options raised are likely to lead to additional costs for businesses and the public sector.

We would welcome comments on the Impact Assessment.²

Copies of this consultation paper are being sent to the people and organisations listed in Annex D. However, that list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

² Comments are also invited on the Regulatory Impact Assessment which Scotland has prepared for its Bill, which is discussed later in this paper. The Scottish RIA can be accessed on <http://www.scotland.gov.uk/Resource/Doc/980/0063847.pdf>

Background

1. This section of the paper sets out the background to the judgment in *Johnston v NEI International Combustion Ltd* (hereafter referred to as the *Johnston case*). It also looks at the position in Northern Ireland before and after the *Johnston case* and the position in Great Britain following the judgment.

The *Johnston case*

2. As mentioned previously, although pleural plaques do not usually cause significant symptoms (if any) or impair lung function, they are a marker of exposure to asbestos.
3. In the 1980s a number of High Court decisions in England and Wales established that damages could be awarded for negligent exposure to asbestos, which had led to the presence of pleural plaques. In *Church v. Ministry of Defence*³ and *Sykes v. Ministry of Defence*⁴ Peter Pain J and Otton J respectively held that symptomless pleural plaques, on their own, were sufficient to constitute actionable damage. In *Patterson v Ministry of Defence*⁵ Simon Brown J held that, although a "symptom-free physiological change", such as pleural plaques, was not in itself an actionable injury, when combined with the risk of future disease and anxiety (neither of which in themselves would be actionable), it could create a cause of action. This was known as the "aggregation theory".
4. In the period following the above decisions, damages for pleural plaques were duly awarded. It would appear that, in England and Wales, a successful claimant typically received an award of provisional damages of between £5000 and £7000 (leaving open the possibility of a further claim if the claimant subsequently developed mesothelioma or another asbestos-related disease), or a full and final award of between £12,500 and £20,000.
5. Many of the claims for damages were met by insurers and, with time, the insurers decided to mount a challenge. The High Court in England and Wales was asked to try ten test cases. In nine of the cases the insurers mounted two arguments —
 - that the claimant had not suffered an injury sufficient to found a claim in negligence; and

³ The Times, 7th March 1984

⁴ The Times, 23rd March 1984

⁵ Decided 29 July 1986, reported (1987) CLY 1194

- that, in so far as there was any such injury, the present level of quantum (i.e. the amount of damages awarded) was far too high.

In the tenth case the issue was only as to quantum.

6. All of the cases were tried by Mr Justice Holland, who gave judgment on 15 February 2005⁶. Paragraph 80 of the judgment shows that the judge rejected “any notion that pleural plaques per se can found a cause of action”. However, he concluded that the plaques were indicators of the relevant injury, which he saw as the permanent penetration of the chest by the asbestos fibres, and he ruled that that penetration, coupled with the associated anxiety, could properly found a cause of action.
7. Although Holland J ultimately found in favour of the claimants, he did reduce the amount of compensation normally payable to £4,000 for provisional damages and £7,000 for full and final damages (except where special damages were in issue or the award included an element for a recognised psychiatric illness).
8. Eight appeals against the High Court judgment were lodged with the Court of Appeal. Seven of the appeals were lodged by the insurers and the eighth by one of the claimants, who appealed against the level of damages awarded by the High Court (and in whose case liability was never in issue).
9. On 26 January 2006⁷ the Court of Appeal, reversed the decision of the High Court, holding in favour of the insurers that pleural plaques were not compensatable. In the case brought by the claimant regarding the level of damages, the Court held that the High Court had erred in principle and that the matter should be remitted to that Court for assessment of damages.
10. The decision in the Court of Appeal was a majority decision and it is clear that the two judges who ruled against the claimants rejected Holland J’s overall conclusion. The third judge, Lady Justice Smith also rejected Holland J’s conclusion that pleural plaques per se could not found an action. Having stated, at paragraph 116 of the judgment, that “such a change does amount to an injury”, she went on to note that all of the High Court judges who had previously considered the issue of actionability had ruled in favour of the claimants and had “found a way of making an award”. She then made the following observations at paragraph 144 of the judgment –

⁶ [2005] EWHC 88 (QB)

⁷ [2006] EWCA Civ 27

“The intellectual processes by which they have arrived at their conclusions have differed but each has arrived at the same result. I venture to suggest that is because, having seen the claimants and having heard their evidence, they felt it would be just to award damages and unjust not to. I also venture to suggest that most people on the Clapham omnibus would consider that workmen who have been put in the position of these claimants have suffered real harm. I do not think that they regard these consequences of asbestos exposure as trivial and undeserving of compensation.”

11. Smith LJ also considered the issue of damages and concluded, at paragraph 162 of the judgment, that “in a typical case of a claimant with pleural plaques and anxiety about his future health, the award should usually be about £5000” for provisional damages. On the issue of final damages, Smith LJ suggested, at paragraphs 177 to 179 of the judgment, that the assessment of the risk of developing a malignant disease should be treated individually. Judges should not, she said, seek to “keep the damages down”. The objective was to “compensate so far as possible” and a standard uplift on a provisional award was not the right approach. She then went on to assess the individual claims.
12. Following the adverse decision in the Court of Appeal four of the claimants appealed to the House of Lords. On 17 October 2007⁸ the Law Lords upheld the Court of Appeal decision that pleural plaques do not constitute actionable or compensatable damage. In doing so, the Law Lords considered and rejected the “aggregation theory”.

The Law of Negligence

13. The law of negligence was thoroughly explored in the House of Lords’ judgment and it is worth highlighting some of the comments made. At paragraph 2 of the judgment Lord Hoffman said:

“Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not compensatable damage. Neither do the risk of future illness or anxiety about the possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both to be taken into account in computing the loss suffered by someone who has actually suffered some compensatable physical injury and therefore has a cause of action. In the absence of such compensatable injury, however, there is no cause of action under which damages may be claimed and therefore no computation of loss in which the risk and anxiety may be taken into account. It follows that in my opinion the development of pleural plaques, whether or not associated with the risk of future disease and anxiety about the future, is not actionable injury. The same is true even if the anxiety causes a recognised psychiatric illness such as clinical depression. The right to protection against

⁸ [2007] UKHL 39

psychiatric illness is limited and does not extend to an illness which would be suffered only by an unusually vulnerable person because of apprehension that he may suffer a tortious injury. The risk of the future disease is not actionable and neither is a psychiatric illness caused by contemplation of that risk.”

At paragraph 36 of the judgment Lord Hope of Craighead said:

“No action lies for a wrong which has not resulted in some element of loss, injury or damage of a kind that was reasonably foreseeable and for which the claimant can sue. It is the limits of this, most basic, principle of the law of negligence that are under scrutiny in these appeals.”

At paragraphs 65 to 67 of the judgment Lord Scott of Foscote said:

“...a number of well-established principles of law, not in dispute before your Lordships nor I believe at any stage in this litigation, need to be kept firmly in mind. First, a cause of action in tort for recovery of damages for negligence is not complete unless and until damage has been suffered by the claimant. Some damage, some harm, some injury must have been caused by the negligence in order to complete the claimant's cause of action....

Second, it is accepted that a state of anxiety produced by some negligent act or omission but falling short of a clinically recognisable psychiatric illness does not constitute damage sufficient to complete a tortious cause of action. This has been the law for a long time....

Third, it is accepted that a risk, produced by a negligent act or omission, of an adverse condition arising at some time in the future does not constitute damage sufficient to complete a tortious cause of action. The victim of the negligence must await events. Here, too, however, it is common ground that if some physical injury has been caused by the negligence, so that a tortious cause of action has accrued to the victim, the victim can recover damages not simply for his injury in its present state but also for the risk that the injury may worsen in the future and for his present and ongoing anxiety that that may happen.”

At paragraph 87 Lord Rodger of Earlsferry helpfully summarised the position, saying:

“...three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. There must be (1) a negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result.”

Medical evidence underpinning the rulings

14. At this stage, it might be helpful to refer to the medical evidence which was presented in the original High Court case before Holland J. The judge, who had the benefit of reports and oral evidence from two eminent consultant physicians, summarised that evidence as follows:

“ Asbestos. Asbestos fibres are of two main types: serpentine and amphibole. The former are curly and flexible, typically the product of white asbestos (chrysotile); the latter are straight and stiff, typically the product of blue asbestos (crocidolite) or brown (or grey) asbestos (amosite). The body has mechanisms for the clearance, alternatively for the neutralising of inhaled asbestos fibres but a proportion of inhaled asbestos will remain in the body for the balance of the lifetime. Per Dr. Moore-Gillon: "It is this characteristic of persistence in the body which gives rise to the long term risks associated with asbestos exposure." Adverting to clearance, this occurs much more rapidly with respect to chrysotile than with amphibole hence the greater the risk of disease from the latter. It is helpful to cite from Dr. Rudd's report of the 11th June 2004:

"Following deposition in the alveolar regions 'scavenger cells' known as macrophages try to engulf the fibres. They succeed with shorter fibres but fail with larger fibres. The cells which fail in their attempts to engulf fibres die and release chemical mediators. These and chemicals generated at the surface of the asbestos fibres are responsible for producing inflammation. If this is sufficiently severe and long lasting fibrosis, i.e. the laying down of complex protein called collagen, may develop. Removal by macrophages and dissolution in situ succeeds in clearing some of the asbestos fibres from the lungs. Clearance occurs much more rapidly for chrysotile than for the amphiboles, probably at least partly accounting for the greater propensity of the latter to cause disease. Fibres which remain in the lungs commonly become coated with ferroprotein to form ferruginous bodies, also termed asbestos bodies."

The Pleura. The movement of the lung in the course of respiration is facilitated by a slippery membrane covering, that is, the pleura. There are two layers to the pleura: the parietal pleura which lines the inside of the rib cage, and the visceral pleura which covers the lungs. Normally there is no gap between these layers which are lubricated with pleural fluid. It is to be emphasised that the pleura is separate from, and not part of the lung. Per Dr. Rudd, op cit "The route by which asbestos fibres reach the parietal pleura has not been fully elucidated". He lists alternative suggestions – none such presently assist.

Pleural plaques. These are localised areas of pleural thickening with well demarcated edges. They usually develop on the parietal pleura but occasionally develop on the visceral pleura. They consist of bland fibrous tissue. The pathogenesis remains uncertain but it is believed

that the presence of asbestos fibres leads to a prolonged low-grade inflammatory response resulting in the release of chemical mediators, in turn leading to the laying down of fibrous tissue. The following propositions can be ventured:

- a. Pleural plaques are by far the most common respiratory effect of asbestos inhalation.
 - b. They may occur after occupational exposure at a lower level than is needed to cause asbestosis.
 - c. The frequency of occurrence and the extent have a relationship with the amount inhaled and the duration of exposure.
 - d. The presence of pleural plaques does not normally occasion any symptoms. Very occasionally the patient may be aware of an uncomfortable grating sensation on respiration.
 - e. Given an absence of symptoms, the presence of pleural plaques is only established by way of chest x-ray or C.T. scan – alternatively on post-mortem autopsy – often incidental to some other investigation. When reading an x-ray it may not be easy to distinguish between pleural plaques and pleural thickening.
 - f. Pleural plaques are rarely detected during the first 20 years following exposure to asbestos. However, exposure to asbestos does not necessarily result in the development of plaques notwithstanding the subsequent passage of 20 or more years.
 - g. With time plaques may become more extensive.
 - h. Plaques do not in themselves threaten or lead to the other asbestos induced conditions nor indeed are they a necessary pre-condition for such; they do not increase the risk of lung cancer; they differ from diffuse pleural thickening; and their pathology is entirely distinct from that of mesothelioma. It is the exposure to asbestos that they evidence, taken in conjunction with the probable life expectancy, which accounts for the risks of further asbestos induced conditions as deployed with respect to each of the claimants...”
15. The doctors who gave evidence were asked whether pleural plaques signified an 'injury' or a 'disease' and, although they emphasised that clinicians were not normally concerned about choice of categorisation, they did say that in some (but not all) medical textbooks pleural plaques were categorised as a benign disease.
 16. Holland J went on to cite the following contribution of Dr. Rudd to Occupational Disorders of the Lung, 2002:

"Pleural plaques are not thought to lead directly to any of the other benign varieties of asbestos-induced pleural disease, nor to pose any risk of malignant change leading to mesothelioma. Their presence may indicate, nevertheless, a cumulative level of asbestos exposure at which there is an increased risk of mesothelioma or other asbestos-related disorders. On average, in the absence of any other evidence about exposure it is reasonable to assume that subjects with plaques will have had higher exposure to asbestos than subjects without plaques. The frequency of development of other complications of asbestos exposure in persons with plaques is not a function of the presence of the plaques, but of the asbestos exposure that caused plaques. Since plaques may occur after a wide range of different exposures, the risks of other asbestos-related conditions may differ widely between different populations and individuals with plaques."

17. It is clear that Holland J set great store by the expert evidence and that it led to his conclusion that pleural plaques per se could not found a cause of action. The majority ruling in the Court of Appeal utilised Holland J's medical findings, from which, it was said, no party had dissented.

18. The Court of Appeal recognised that pleural plaques constituted a physiological change in the body but the majority of the judges echoed Holland J's conclusion that that in itself was insufficient to found a cause of action. The majority position was summed up at paragraphs 18 to 23 of the Court of Appeal judgment, where Lord Phillips CJ and Lord Justice Longmore said :

"Pleural plaques undoubtedly constitute a physiological change in the body. We have described the nature of this change above. For present purposes their relevant feature is that, save in the case of about 1% which no one has suggested has significance, they are symptomless, have no adverse effect on any bodily function and, being internal, have no effect on appearance. In short, ignoring the 1%, no one is any the worse physically for having pleural plaques."

"It has always been the law in England and Wales that negligence is not actionable per se, it is only actionable on proof of damage. While such damage need not be substantial it must be more than minimal. This is not controversial...."

"It is common ground in this case, rightly in our view, that the development of pleural plaques is insufficiently significant, of itself, to constitute damage upon which a claim in negligence can be founded."

19. The majority approach in the Court of Appeal was, in turn, reflected in the House of Lords. At paragraph 19 of the House of Lords' judgment Lord Hoffman said:

“...One is not concerned with whether the plaque is in some sense 'injury' or a 'disease'. The question is whether the claimant has suffered damage. That means: is he appreciably worse off on account of having plaques? The rare victim whose plaques are causing symptoms is worse off on that account. Likewise, the man with the disfiguring lesion is worse off because he is disfigured. In the usual case, however (including those of all the claimants in these proceedings) the plaques have no effect. They have not caused damage.”

20. In contrast, Lord Hope of Craighead accepted, at paragraph 49 of the judgment that, pleural plaques “are a form of injury”. However, in his view, they were not harmful, did not give rise to any symptoms and did not “lead to anything else which constitutes damage”. He concluded that:

“...there [was] no cause of action because the pleural plaques in themselves do not give rise to any harmful physical effects which can be said to constitute damage....”

21. Lord Scott of Foscote also emphasised the absence of physical effects, saying as follows at paragraph 68 of the judgment:

“...Pleural plaques are not visible or disfiguring. None of the appellants suffered from any disability or impairment of physical condition caused by the pleural plaques. The plaques were asymptomatic and were not the first stage of any asbestos-related disease. The inhalation of the fibres and the formation of the plaques involved no pain or physical discomfort. Those being the facts the conclusion that the presence of pleural plaques could not per se suffice to complete a tortious cause of action in negligence is, in my opinion, unassailable. Indeed both before Holland J and in the Court of Appeal the appellants conceded that that was so....”

22. Lord Rodger of Earlsferry summarised the three elements which must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence or breach of statutory duty. It is clear from his comments in paragraph 88 of the judgment that he thought the claimants' main stumbling block was the third element (material damage as a result of the negligent act or breach of statutory duty) and he stated as follows:

“In these cases the claimants do not suggest that the presence of the asbestos fibres in their lungs constitutes an injury. Rather, they argue that the plaques constitute an injury – the plaques are 'a physical change' in their bodies, as envisaged by Lord Pearce in Cartledge's case [1963] 1 All ER 341 at 349, [1963] AC 758 at 779. Taken by themselves, however, the plaques are benign and asymptomatic. So, even assuming that the plaques could constitute a relevant 'injury' to the claimants' bodies, they do not cause them any material damage and so do not give rise to a cause of action....”

23. Lord Mance confirmed, at paragraph 103 of the judgment, that he agreed with the conclusion reached that pleural plaques by themselves do not constitute or involve injury and damage sufficient to enable an action to lie in tort.

Effect of the judgment

24. Compensation is already available for a range of asbestos-related diseases, such as mesothelioma, asbestosis, pneumoconiosis and asbestos-related lung cancer and the House of Lords judgment in the Johnston case confirmed that, if the claimants did develop any recognised asbestos-related disease in the future, they would then have a claim in respect of that disease. However, following the Law Lords' decision, compensation is no longer available for symptomless pleural plaques.
25. It has been stated that the judgment in the Johnston case reversed over twenty years of precedent and practice. It is, however, clear that the courts in England and Wales reached their conclusions on the basis of the expert medical evidence presented to them, the validity of which was not in question.
26. The Industrial Injuries Advisory Council (IIAC)⁹, has also conducted a detailed examination of the evidence in relation to asbestos-related diseases, including pleural plaques. The IIAC reported on that research in July 2005¹⁰ and concluded that "there is a lack of evidence that pleural plaques cause impairment of lung function sufficient to cause disability." Accordingly, the IIAC did not recommend adding pleural plaques to the list of prescribed diseases for the purpose of industrial injuries benefits. It did, however, undertake to "continue to monitor new research".

Position in Northern Ireland before and after the Johnston case

27. It would appear that, prior to the Johnston case, the courts in Northern Ireland had accepted that pleural plaques in and of themselves were actionable (i.e. there was no need to rely on the aggregation theory referred to at paragraph 3 above). In paragraph 12 of the judgment in *Bittles v Harland and Wolff*¹¹, Mr Justice Girvan, as he then was, said as follows:

"In a case such as the present where the plaintiff has been exposed to and has inhaled asbestos dust as a result of the defendant's negligence and has in consequence developed pleural plaques, the

⁹ The IIAC's remit includes providing independent advice to the Secretary of State for Work and Pensions on the prescription of industrial diseases for the purposes of Industrial Injuries Benefits.

¹⁰ http://www.iiac.org.uk/pdf/command_papers/Cm6553.pdf

¹¹ [2000] NIQB 13

development of the pleural plaques even if asymptomatic represents bodily damage and a personal injury which when combined with the defendant's breach of a duty of care brings about the establishment of a cause of action against the defendant. It is trite law that for a plaintiff to succeed in an action for negligence he must establish a duty of care, a breach of that duty and consequent damage. Once the plaintiff has suffered the physical bodily damage represented by the pleural plaques his cause of action has accrued and the plaintiff's claim will relate to all the physical consequences and risks which flow from the negligence. Thus the plaintiff is entitled to recover damages both for the pleural plaques and for the risks of developing more dangerous medical conditions such as asbestosis and mesothelioma. "

28. It would also appear that, in Northern Ireland, awards of provisional damages of between £5000 to £7,500 were considered appropriate¹².
29. However, whatever the basis for the rulings in Northern Ireland prior to the Johnston case, it is clear that, post Johnston, damages for symptomless pleural plaques are no longer available in the courts in Northern Ireland. This is because those courts will follow the decision of the House of Lords.

Position in Scotland before and after the Johnston case

30. Like Northern Ireland, Scotland, appears to have accepted pleural plaques as an "identifiable injury for which damages were recoverable".¹³ However, it has been suggested that the Scottish courts are not bound by the decision in the Johnston case.¹⁴
31. The Scottish Executive has, however, moved to remove any doubt about the decision by introducing legislation which curtails the effect of the judgment. The legislation is discussed in more detail below.

Reaction to the Johnston case

32. The decision in the Johnston case was welcomed by the insurance industry. However, several early day motions, which called for the decision to be overturned, were set down in the UK Parliament and the matter has been the subject of two adjournment debates. During those debates, many MPs spoke in favour of the decision being overturned by legislation. A similar desire for legislative change was evident when the matter was debated in the Scottish Parliament on 7 November 2007.

¹² See judgment of Kerr J in *Elizabeth Cully Weir v Harland & Wolff plc* [Ref: KERF3597, delivered 31.01.2002] and judgment of Weatherup J in *Daniel John Kennedy* [Ref: WEAH3163T, delivered on 14.02.2002]

¹³ *Gibson v McAndrew Wormald* [1998] SLT 562

¹⁴ The Johnston case has been cited in a Court of Session case: *Helen Wright v Stoddard International plc*: <http://www.scotcourts.gov.uk/opinions/2007CSOH173.html>. .

Developments in Scotland

33. On 29 November 2007, the Scottish Executive announced that it would legislate to reverse the decision in the Johnston case by re-establishing asbestos-related pleural plaques as an actionable personal injury. It was stated at the time that the terms of the Bill would be retrospective and, as such, would reach back to 17 October 2007, when the ruling in the Johnston case was given.
34. The Scottish Executive subsequently stated that the legislation would also cover symptomless asbestosis and pleural thickening¹⁵, thereby removing any suggestion that the reasoning in the ruling could be extended to those conditions. A partial Regulatory Impact Assessment, which assessed the Government's proposals, was consulted on between February and April 2008.
35. On 23 June 2008 the Damages (Asbestos-Related Conditions) (Scotland) Bill ("the Bill") was introduced to the Scottish Parliament. A copy of the Bill is attached at Annex C.
36. Clause 1 of the Bill¹⁶ states that asbestos-related pleural plaques are a personal injury which is not negligible and confirms a right to claim damages in respect of that injury. Although the Clause disapplies the ruling in the Johnston case, it goes on to say that other statutory or common law rules for determining liability are not affected.
37. Clause 2 states that asbestos-related pleural thickening and asbestosis are also personal injuries which are not negligible. The need to provide evidence of symptoms or a likelihood of symptoms developing will, it appears, only arise in respect of the quantum of damages.
38. Clause 3 states that the period between the date of the ruling in the Johnston case and the commencement of the new provisions will not apply for limitation purposes. This is to offset the risk of claims becoming time-barred during that period.
39. Clause 4 provides for the commencement of the new provisions and their retrospective effect. Commencement will be by way of statutory instrument. However, it is clearly stated that the terms of the Bill will not apply to cases which have been settled or determined prior to the commencement date.
40. Clause 5 sets out the short title and states that the provisions in the Bill are binding on the Crown.

¹⁵ It would appear that some defenders in cases in the Court of Session had said they would pursue cases in which the cause of action is minimal symptomless asbestosis as likely test cases.

¹⁶ In Scotland, the provisions of a Bill are referred to as Sections, rather than Clauses

41. The Bill has been widely welcomed by asbestos groups and other bodies, including the Faculty of Advocates. However insurers and business interests have raised some concerns about increased costs of claims and insurance premiums and the possible involvement of claims management companies. They have also suggested that the Bill will open the floodgates for claims for other conditions that are not currently compensatable. In response, the Scottish Executive has said the fears about the wider implications of the Bill are misplaced and has pointed out that the Bill only deals with three asbestos-related conditions - pleural plaques; symptomless pleural thickening; symptomless asbestosis- and will have no effect beyond those conditions.
42. The issue of the Bill's retrospectivity has also been raised, the suggestion being that that aspect of the Bill may breach the European Convention on Human Rights. The Scottish Executive has, however, rejected that suggestion and has pointed out that the Bill should be retrospective in order to completely overturn the Johnston case and maintain the coherence of the law. The Executive also takes the view that the provisions of the Bill, including the retrospective provisions, are within the legislative competence of the Scottish Parliament.¹⁷ The issue of retrospectivity has also been raised in England and Wales and is discussed further at paragraphs 53-54 below.
43. At this stage, it is worth noting that any change to the law in Scotland could have implications for the rest of the UK, either in terms of cases being raised against UK Government departments¹⁸ or in terms of cross-jurisdictional cases. Whilst the Scottish Executive accepts that forum-shopping may be attempted, it believes the established rules of jurisdiction and applicable law will ensure that only cases with a substantial Scottish connection will be tried in Scots courts under Scots law.

Developments in England and Wales

44. On 9 July 2008 the Ministry of Justice ("MoJ") issued a consultation paper regarding the decision in the Johnston case. In addition to setting out the background to the ruling, MoJ's Paper –
- considers the law and medical evidence which underpinned the ruling;
 - states that the Secretary of State for Work and Pensions has asked the IIAC to undertake a further review of pleural plaques in relation to the Industrial Injuries Benefit Scheme;

¹⁷ See section 29(2)(d) of the Scotland Act 1998. Both the Minister introducing the Bill and the Parliament's Presiding Officer have signed statements to the effect that the Bill is within the legislative competence of the Parliament.

¹⁸ The Scottish Executive has estimated that the Ministry of Defence has 37 "Scottish cases" and is likely to face an average of 12 cases per year. It has also been estimated that the Department of Business, Enterprise and Regulatory Reform has 136 "Scottish cases".

- states that the Chief Medical Officer for England and Wales has agreed to appoint a group of NHS experts to conduct an independent review of the available medical evidence;
- proposes that action should be taken to improve the understanding of pleural plaques and provide support and reassurance to those who have been diagnosed with the condition;
- discusses the possibility of a register of people who have been diagnosed with pleural plaques;
- considers the implications of a change to the law; and
- invites views on the merits of establishing a no fault payment scheme.

Increasing support, help and information for people with pleural plaques

45. Clearly, the UK Government is keen to raise awareness of the nature of pleural plaques and to help allay concerns wherever possible. It believes the condition is often misunderstood and would like to improve understanding, not only for those diagnosed, but also among the wider public. With that in mind, MoJ's Paper proposes a guidance note on the implications of a diagnosis of pleural plaques, which could be issued to doctors. It is also suggested that a leaflet, which explains the nature of pleural plaques, could be made available to hospitals, GPs' surgeries, Citizens' Advice Bureaux, trade unions, relevant websites and other outlets.

Register of those diagnosed with pleural plaques

46. The MoJ Paper also discusses the arguments in relation to a central register or database of people diagnosed with pleural plaques. Some have suggested that this could help avoid delays in obtaining details of employment history and insurance, in the event that a person with pleural plaques subsequently develops an asbestos-related disease.
47. MoJ's Paper indicates that the UK Government has discussed the possibility of such a register with key stakeholders, representing both claimant and defendant interests. However, it would appear that there was little enthusiasm for such a register, not least because past claims experience would seem to show that no more than 5% of people diagnosed with pleural plaques subsequently develop an asbestos-related disease. In addition, stakeholders suggested that a requirement to register could undermine attempts to allay fears about a diagnosis of pleural plaques.
48. On 23 January 2008 UK Ministers suggested, during an adjournment debate in Parliament on pleural plaques, that the creation of a register did not appear to be appropriate. However, MoJ's Paper invites views on the issue.

Changing the law

49. MoJ's Paper also discusses the possibility of overturning the judgment in the Johnston case by changing the law of negligence. This would mean that people diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able to successfully claim compensation through the civil courts in the same way as they had done prior to the Court of Appeal decision in the Johnston case.
50. It is difficult to assess the likely level of claims, largely due to the asymptomatic nature of pleural plaques, as well as the long latency of asbestos-related conditions. MoJ's paper estimates that, in England and Wales, the cost associated with a change to the law could be anywhere between £3.7bn and £28.6bn. The large gap between the figures is striking. However, as MoJ points out, the lack of information precludes the narrowing of the range.
51. MoJ's paper acknowledges that the judgment in the Johnston case raises very complex issues and states that the UK Government considers that there would need to be very strong reasons to interfere with the Law Lords' decision.
52. Two main arguments against a change to the law are discussed – retrospectivity and respect for the common law (this is the law which is established by decisions of the courts).

Retrospectivity

53. In order to ensure that all those affected by the decision could receive compensation, the legislation would have to apply to the cases included in the decision itself and any case in which there had been no prior judgment or settlement. This would include all those cases which had been stayed pending the outcome in the Johnston case and any cases which had not commenced because of the decision in either the Court of Appeal or the House of Lords.
54. MoJ's paper suggests that retrospective provisions of that nature could, potentially, raise issues in relation to the European Convention of Human Rights on the basis that they interfered with settled arrangements in a way which could be argued to breach the Convention. There is an argument that, exceptionally, a judgment can be overturned by primary legislative intervention. It would be necessary to assess the proportionality of any such interference and the likely effect any change would have, against the justification for the interference, especially given the very clear nature of the Law Lords' reasoning. Although it recognises that retrospective provisions were included in the Compensation Act 2006 ("2006 Act") to reverse the effect of the House of Lords' judgment in *Barker v Corus* (and conjoined cases) in relation to mesothelioma claims, the Paper points out that those were highly exceptional circumstances affecting

seriously ill claimants and the degree of retrospectivity affected a very small number of cases over a very short period. Moreover, as the Paper also points out, the 2006 Act simply removed a procedural hurdle which was preventing people from getting their compensation quickly, rather than making a condition compensatable in the first place.

The Common Law

55. MoJ's paper suggests that interference with the fundamental principles on which the Law Lords' decision was based could have wider consequences and could be used as a precedent to argue for compensation in other situations. For example, there could be a call for compensation in relation to passive smoking or simply for exposure to asbestos and the associated worry, even if no damage has yet occurred and regardless of whether the exposure has resulted in any symptoms or injury
56. The Paper suggests that any such development could considerably increase the level of litigation and the possibility of weak or spurious claims and could have a damaging effect on businesses and the economy.
57. The Paper goes on to say that amending legislation and the availability of compensation could undermine the proposed awareness-raising measures and counteract attempts to allay unnecessary concerns by sending out mixed messages about the nature of pleural plaques.
58. The Paper invites views on overturning the judgment, but indicates that the UK Government is not currently minded to favour this approach, not least because of the implications for the fundamental integrity of the law of negligence.

Financial support

59. MoJ's Paper raises the possibility of a payment scheme, as an alternative to a change to the law. It recognises that there could be significant obstacles to the creation of any such scheme, but says the UK Government is willing to listen to further arguments on the issues and to consider what form any such scheme might take. It explains that, in view of the House of Lords' ruling, particular grounds would be needed for any scheme providing payments to people with pleural plaques to justify any scheme that may be introduced.
60. As mentioned above, there is no definitive information on either the total number of people with confirmed diagnoses of pleural plaques or the likely number of people who will ultimately develop pleural plaques. Estimates regarding the potential numbers of people who would be eligible for financial support are, therefore, highly uncertain, as they depend on a number of assumptions that cannot be verified. The

uncertainty regarding the number of pleural plaques diagnoses translates into a wide range for the potential costs of each of the options of financial support.

61. MoJ's Paper recognises that further consideration would have to be given to how, and by whom, any scheme would be funded. One possibility would be for a sum to be paid by each relevant insurer or department¹⁹ into a central fund. The sum would be calculated on a pro-rata basis, based on the number of stayed cases, together with a pro-rata sum to cover other cases where pleural plaques had been diagnosed, but compensation had not already been received. Alternatively, the funding of the scheme could fall solely to the Government and the taxpayer.

62. When exploring the option of a payment scheme, MoJ identified the following difficulties —
 - insurers might, in light of the House of Lords' judgment, be reluctant to provide funding for the scheme on a voluntary basis. Any such reluctance could only be overcome by primary legislation;
 - a payment scheme could, depending on who would be required to fund it, raise issues in relation to the European Convention of Human Rights. It would, therefore, be necessary to assess the proportionality of the proposals and the likely effect any change would have, against the justification for the change;
 - the introduction of a payment scheme in this area could create a precedent and lead to calls for the Government to introduce payment schemes in a range of other areas;
 - businesses which choose to operate within the UK must be able to do so in a fair and transparent environment. If there was a reduction in confidence in the stability of the UK as a place to do business the competitiveness of the UK could be damaged.

63. MoJ went on to consider two possible approaches to providing financial support, namely, a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques —
 - within a fixed period (say, five years) before the date of the decision in the Johnston case ; or
 - within a fixed period before the date of the decision and thereafter.

¹⁹ Many of the cases which were stayed pending the outcome of the Johnston case related to the insurance industry. However, others related to certain former nationalised industries and to Government departments, such as the Department for Business, Enterprise and Regulatory Reform, the Ministry of Defence and the Department for Transport.

64. A no fault scheme was seen as the simplest way to provide a payment to people without involving significant legal costs. This would mean that an applicant to the scheme would not have to prove negligence. S/he would only need to provide evidence of the diagnosis of pleural plaques, proof of their identity, and that they had worked in an environment involving asbestos exposure. This would be similar to the criteria for the scheme for lump sum payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979²⁰. In view of this, legal costs would be minimised and the applicant would not need legal assistance (as is similarly the case with the 1979 Act scheme).
65. The applicant's right to bring a claim in negligence in the event that they subsequently developed an asbestos-related disease would, of course, be preserved.

A no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007

66. MoJ estimates the cost of this approach at between £52m – £196m (excluding set up costs), reflecting the level of uncertainty about the number of people who have been diagnosed with pleural plaques but who have not received compensation. That figure was calculated on the basis of a fixed payment of £5000 (in the light of the discussions in the High Court and the Court of Appeal on the appropriate level of damages following a diagnosis of pleural plaques, see paragraphs 7 and 11 above). However, it was recognised that, as pleural plaques have been held not to be actionable damage and in view of the minimisation of legal costs, a lower figure might be more appropriate and would be likely to be necessary to make a no fault scheme affordable, were it to be introduced.
67. MoJ also recognises that a coordinating role would be necessary, with any scheme being run either by the Government, or an appropriate agency, or contracted out. The relevant administrative costs would, therefore, need to be provided for and a register would be required for all payments made, to avoid the possibility of double payments.
68. MoJ favours a fixed limitation period to avoid claims several years into the future and the associated administrative costs. It was suggested that the appropriate limitation period would be one year from the date on which the scheme came into force.

²⁰ The corresponding legislation in Northern Ireland is the Pneumoconiosis etc (Workers' Compensation) (Northern Ireland) Order 1979

A no-fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 and also to those diagnosed with pleural plaques since the judgment and in the future

69. This approach would cover both people previously diagnosed with pleural plaques who had not already received compensation and anyone diagnosed since the decision in the Johnston case or in the future.
70. MoJ suggests that a scheme limited to those diagnosed before the decision in the Johnston case could be justified on the basis that those individuals had an expectation of compensation. This could not, however, be said about those diagnosed after the decision.
71. MoJ's paper recognises that it is not possible to reach an authoritative view on the likely ongoing level of pleural plaques cases or the timescale over which they may arise. For the purposes of its accompanying Initial Impact Assessment MoJ used a projected period of 20 years. However, there were suggestions that the incidence levels could continue to increase for at least 40 years after exposure. This would mean that any scheme which provided for a payment for future cases would have to operate for a lengthy period and deal with a highly unpredictable number of cases, with unpredictable costs.
72. MoJ's estimated costs of this approach were between £780m – £4.8bn (excluding set up costs), again reflecting the uncertainty regarding the potential number of claims.
73. One particular concern referred to by MoJ is that this approach might encourage the use in areas of heavy industry of "scan vans" offering x-rays and CT scans in return for a fee for the purpose of obtaining a compensation payment. As MoJ points out, the use of x-rays and CT scans are governed by legislation²¹ and the Chief Medical Officer for England and Wales has indicated that the only case for justifying the procedure in this context would be if there were a reasonable suspicion of asbestos-related lung disease arising from a known risk of asbestos exposure.
74. Initiating an x-ray or CT scan purely based on a wish to demonstrate pleural plaques would not be justified, as pleural plaques are benign and do not impair lung function. The regulations governing the use of ionising radiation apply equally to the NHS and the private sector.

²¹ The Ionising Radiation (Medical Exposure) Regulations 2000 [S.I.2000/1059] and the Justification of Practices Involving Ionising Radiation Regulations 2004 [S.I. 2004/1769]. The 2004 Regulations extend to Northern Ireland and the Ionising Radiation (Medical Exposure) Regulations (Northern Ireland) 2000 [S.R.2000 No.194] make corresponding provision to the 2000 Regulations.

Compliance is monitored by a specialist inspectorate within the Healthcare Commission and they are empowered to enforce the regulations. If a private “scan van” were to offer x-rays purely for the purpose of assessing eligibility for compensation, then the Healthcare Commission would be asked to investigate .

75. In terms of the operation of this scheme, MoJ suggests that similar arrangements in relation to evidence and payments could apply. In addition to the proposed limitation period of one year from the date of commencement of the scheme for cases already diagnosed, a limitation period of one year from the date of diagnosis could apply to new cases.
76. MoJ recognises that the administration of this scheme would be more complex and costly, both in terms of the number of claims and the timescale over which they could arise. It suggests that pro-rata payments into the scheme by insurers and Government would have to be made on an annual basis and reflect actuarial advice on the likely demands on the fund each year.
77. In order to control the parameters of the scheme and limit the potential costs and complexity, MoJ refers to the possibility that payments for future cases might be confined to employment in specific key industries, where exposure to asbestos has been particularly prevalent. However, it recognises that such an approach could be criticised on the ground that it discriminates between potential claimants on an arbitrary basis and indicates that it does not appear to be tenable.
78. MoJ notes that the proposed Bill in Scotland had been extended to asymptomatic pleural thickening and asymptomatic asbestosis, which were not specifically dealt with in the Johnston case. MoJ’s Paper states that the UK Government does not consider it appropriate to extend a no fault payment scheme, if introduced, to either of those other conditions, which usually lead to the development of symptoms, for which compensation under the civil law is already available.
79. MoJ’s Paper suggests that each payment scheme could have similar consequences to a change to the law and could be used as a precedent to argue for compensation in other situations. It suggests that consideration should also be given to the effect on the UK economy of providing compensation in these circumstances.
80. Ultimately, the MoJ Paper indicates that, in light of the medical evidence available, the UK Government sees difficulties with both no fault schemes and that, were any form of financial compensation to be offered, it considers the rationale for the open-ended scheme to be weaker than that for the narrower scheme.

Options for Northern Ireland

81. As stated earlier, the decision in the Johnston case will be followed by the courts in Northern Ireland and this means the decision has effectively ruled out any further claims for pleural plaques. Accordingly, even if a case for asymptomatic pleural plaques was lodged with the courts here before 17 October 2007, it will not proceed and will not result in a payment of damages.
82. As in Great Britain, there has been a lot of criticism of the decision in the Johnston case and calls for a change to the law. The Department has acknowledged that those calls will have to be properly assessed and it has, therefore, initiated this consultation exercise in Northern Ireland, with a view to gathering further information and seeking views on the issues.
83. Just as in Great Britain, there are no firm figures regarding the level of pleural plaques in Northern Ireland²². The main options²³ within Northern Ireland are the same as the options elsewhere in the United Kingdom, namely –
 - accept the status quo and let the decision in the Johnston case stand;
 - undertake an awareness campaign;
 - create a register of people who have been diagnosed with pleural plaques;
 - legislate to overturn the decision in the Johnston case; or
 - introduce some form of payment scheme.

Accept the status quo

84. Clearly, if the decision in the Johnston case is left to stand, people who have been diagnosed with asymptomatic pleural plaques will not be able to claim compensation.
85. Those who support this option would point to the strength of the judgment in the case, the undisputed medical evidence which was before the House of Lords, the undesirability of creating a special class of claimant and the danger that claims management companies will encourage claims.

²² Mesothelioma is the only asbestos-related disease for which projections of the future burden are available.

²³ As the MoJ Paper points out, the UK Government has commissioned reviews of the evidence relating to pleural plaques. However, those reviews are likely to be equally relevant to Northern Ireland and there are no plans to commission separate reviews here.

86. Those who oppose this option would say that, in the Johnston case, it was accepted that the claimants had been exposed to asbestos and it is unfair that people who managed to settle their claim or obtain a court judgment in earlier years should be the only ones to receive compensation.
87. We believe the arguments on either side of the debate should be further explored and we have set out at paragraph 102 below a series of questions regarding legislative change.

Awareness campaign

88. The UK Government's support for enhanced support and information²⁴ seems sensible and there would appear to be merit in a general awareness campaign. However, we want to hear your views.

QUESTION 1: DO YOU THINK INFORMATION LEAFLETS ON PLEURAL PLAQUES WOULD BE USEFUL? IF NOT, WHY NOT?

Creation of register

89. We have reflected on the issue of a register. We note that MoJ's Paper indicates that a register may not be appropriate for a number of reasons, for example that the number of people who develop a more serious asbestos-related disease, following a diagnosis of pleural plaques, is very small and that the creation of a register could undermine any awareness campaign.
90. In our view, the creation of a register would throw up a range of practical issues, such as —
- who would maintain the register?
 - what information would be included in it?
 - how would personal data be both protected and kept up to date?
 - how comprehensive would the register be (presumably, an obligation to register could only arise by virtue of a legislative requirement)?
 - would it be insensitive to ask people to register post-diagnosis and would people feel stigmatised?
91. On balance, we believe the burdens associated with a register would far outweigh any benefits. However, again, we want to hear your views:

QUESTION 2: WOULD YOU SUPPORT THE CREATION OF A REGISTER? PLEASE GIVE REASONS FOR YOUR ANSWER.

²⁴ The Scottish Executive has also expressed an interest in improving the availability of information and advice.

Legislate to overturn the decision in the Johnston case

92. Clearly, the Scottish Executive has decided that people who have been negligently exposed to asbestos and who have been subsequently diagnosed with pleural plaques should continue to be able to raise an action for damages. A number of reasons have been advanced in support of the decision to legislate. In particular, it has been argued that —
- the people who are responsible for the negligent exposure should be called to account;
 - if a person who has been diagnosed with pleural plaques does go on to develop a more serious asbestos-related disease, s/he will not be able to claim damages for the anxiety arising from the separate diagnosis of pleural plaques;
 - if liability is established following a diagnosis of pleural plaques, that point will not be in issue if a more serious disease is established, allowing for any claim regarding the more serious disease to be dealt with quickly; and
 - as a matter of public policy, pleural plaques should be viewed as material harm.
93. One particular argument which has been raised in support of legislative change in Northern Ireland is that it would be unjust if people in Scotland could claim compensation but people here could not.
94. Those who oppose legislative change may suggest that Scotland has a different legal system to Northern Ireland and may argue that, on that basis, different considerations apply. They may also argue that legislative intervention will set an unhelpful precedent by creating a privileged class of claimant (i.e. one who does not have to prove damage) or encouraging lobbying campaigns in respect of “unwelcome” court decisions.
95. It is worth stating at this stage that any legislative proposal, in any field, must be carefully thought through and assessed. In this instance, the absence of information on the level of pleural plaques makes it impossible to fully assess the likely impact of legislative change in this particular area. The Scottish Government tried to overcome the information gap by using predictions about future mesothelioma deaths to estimate the future increase in the number of pleural plaques cases. It is envisaged that the annual mesothelioma deaths in Great Britain will rise by up to 20% between now and a peak of around 2015. Thereafter, the mortality rate is expected to decline. Using that information and information on the existing number of cases of pleural plaques, the Scots estimated that there would be about 200 pleural plaques cases per year and around 20 cases per year for

asymptomatic pleural thickening and asymptomatic asbestosis. It was also estimated that each of the cases would cost around £25,000²⁵.

96. We have considered whether a similar approach should be used in Northern Ireland. However, we have concluded that it would be undesirable to proceed on that basis because –

- the two conditions are entirely separate. Accordingly, calculations based on the number of mesothelioma cases are unlikely to produce an indicative figure, however rough, for the number of pleural plaques cases;
- the key issue is not just the number of people who have been diagnosed with pleural plaques following negligent exposure to asbestos, but the number of people within that group who are likely to mount a claim. In this regard, it has been suggested that the publicity surrounding the Johnston case has alerted more people to the issue of pleural plaques. Accordingly, if legislation were to be introduced, it is likely that, in the immediate post-implementation period, we would encounter a higher volume of claims;
- asbestos has been discovered in a range of locations throughout the UK, from council housing to hospitals and even leisure centres. This means that the *potential* for exposure could be much greater than has been thought to date.

97. Leaving aside the issue of the likely number of cases, it is worth pausing at this stage to consider where the burden of responsibility would lie, if amending legislation were introduced. Traditionally, people have associated asbestos exposure with heavy industries, such as shipbuilding or construction. As a result, discussions regarding the burden of liability have tended to focus on the industrial sector and the insurance companies which underwrite that sector. It has to be recognised, however, that liability is also a live issue for Government departments, local government and smaller companies.

98. In Scotland it has been recognised that, if the proposed Bill is made, the cost of employers' liability and public liability insurance premiums is likely to increase²⁶. This has led to a suggestion that the increased premiums could make Scotland a less attractive place to do business. However, the Scottish Executive has emphasised the need to balance business friendly policies with the need to protect individual citizens.

²⁵ The provisional regulatory impact assessment in Scotland had used a settlement figure of £22,000. This was comprised of £8,000 by way of compensation payment, £8,000 for claimant's costs and £6,000 for defendant's costs. The figure was an average derived from litigated and unlitigated claims and was based on known settlement figures for 2003-2004. The Scottish Executive has said the £25,000 figure used in the final assessment is a "reasonable working assumption" of average costs.

²⁶ It would appear, however, that the insurance industry has informed the Scottish Executive that premiums for first party insurance (e.g. life cover, illness cover etc.) will not be affected.

99. We believe there is also a possibility that, if there is an enhanced level of claims, there will be further burdens on the courts and the legal system. There may also be issues around legal aid²⁷. In this regard, it is worth noting that the Scottish Executive has expressed concern that a large proportion of the settlement figures are comprised of legal fees. It has expressed the hope that, if the proposed Bill is made, efforts will be made to settle claims more quickly and cheaply
100. It will be clear from the above that the issue of legislative amendment is far from straightforward. If we were to agree, in principle, that legislative amendment is desirable, we would then have to consider what form the legislation should take.
101. In order to help us consider the way forward, we would welcome any information which you can provide on the likely number of pleural plaques cases or the handling of such cases. In particular, we would welcome information on settlement figures and associated legal costs.

QUESTION 3: DO YOU HAVE ANY INFORMATION ON SETTLEMENT FIGURES AND ASSOCIATED LEGAL COSTS OR ANY ESTIMATES REGARDING:

- **THE NUMBER OF PEOPLE CURRENTLY DIAGNOSED WITH PLEURAL PLAQUES;**
- **THE FUTURE NUMBER OF PEOPLE WHO WILL DEVELOP PLEURAL PLAQUES;**
- **THE FUTURE DISTRIBUTION OF PLEURAL PLAQUES CASES;**
- **THE PERIOD OF TIME OVER WHICH PEOPLE WILL DEVELOP PLEURAL PLAQUES;**
- **THE NUMBER OF PEOPLE DIAGNOSED WITH PLEURAL PLAQUES PRIOR TO THE HOUSE OF LORDS' DECISION AND WHO HAVE NOT RECEIVED COMPENSATION.**

102. We would also be grateful if you would consider the following questions and let us have your views —

QUESTION 4: DO YOU THINK LEGISLATION SHOULD BE INTRODUCED TO OVERTURN THE DECISION IN THE JOHNSTON CASE?

QUESTION 5: IF YOU DO THINK LEGISLATION SHOULD BE INTRODUCED, WOULD YOU FAVOUR LEGISLATION WHICH —

- (a) RESTRICTS CLAIMS TO THOSE WHO HAD BEEN DIAGNOSED WITH PLEURAL PLAQUES BEFORE THE JOHNSTON CASE?;**

²⁷ If legal aid has been granted and the claim is successful, the legal aid costs and outlays will usually be covered by an award of costs against the unsuccessful party. However, if the claim is unsuccessful (for example, the court may decide that the defendant was not responsible for the exposure to asbestos) there could be a cost to the public purse. In England and Wales, legal aid is not available for personal injury claims, other than clinical negligence.

(b) ALLOWS ANYONE WHO HAS BEEN DIAGNOSED WITH PLEURAL PLAQUES TO CLAIM?;

(c) FOLLOWS THE BILL IN SCOTLAND BY COVERING ASYMPTOMATIC PLEURAL PLAQUES, PLEURAL THICKENING AND ASBESTOSIS?

QUESTION 6: DO YOU THINK THERE IS A DANGER THAT LEGISLATION WILL CREATE A PRIVILEGED CLASS OF CLAIMANT OR SET AN UNHELPFUL PRECEDENT?

WHEN ANSWERING THE ABOVE QUESTIONS, PLEASE GIVE REASONS FOR YOUR VIEWS.

Payment scheme

103. The issues around payment schemes have been explored above. Undoubtedly, the option of a payment scheme is superficially attractive, in that it could provide rapid financial relief to people who have been diagnosed with pleural plaques, but also allow for payment levels to be adjusted in line with some of the judicial comments in the Johnston case.

104. The general concept of payment schemes is not new. Indeed, the Mesothelioma, etc., Act (Northern Ireland) 2008²⁸ allows for a lump sum payment to be made to those suffering from diffuse mesothelioma (or their dependants if the person is deceased). However, there are restrictions on eligibility and the scheme feeds in to the social security tribunal system, allowing for rights of appeal. Moreover, provision is made for the lump sum to be recovered from any compensation payment.

105. In our view, any comparisons with the scheme established under the 2008 Act would be misplaced and the considerations outlined at paragraph 62 above would weigh against a payment scheme for pleural plaques. We would, however, welcome views on the issue.

QUESTION 7 : DO YOU SUPPORT THE OPTION OF A PAYMENT SCHEME FOR PLEURAL PLAQUES? IF SO, HOW WOULD YOU SEE THE SCHEME WORKING? IN PARTICULAR, WHAT LEVEL OF PAYMENT WOULD BE APPROPRIATE AND SHOULD A LIMITATION PERIOD BE APPLIED?

²⁸ 2008 c.9 The Act received Royal Assent on 2nd July 2008.

Equality impact screening

106. In accordance with section 75 of the Northern Ireland Act 1998, the Department must ensure that, in carrying out its functions, it has due regard to the need to promote equality of opportunity between:

- persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- men and women generally;
- persons with a disability and persons without; and
- persons with dependants and persons without.

107. Without prejudice to the obligation set out above, the Department is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

108. We believe that none of the options outlined at paragraph 83 above would have a differential impact on the equality groupings. We would, however, welcome your views:

QUESTION 8: WOULD ANY OF THE IDENTIFIED OPTIONS LEAD TO A HIGHER OR LOWER LEVEL OF PARTICIPATION OR UPTAKE BY THE SECTION 75 GROUPS OR HAVE A DIFFERENTIAL IMPACT ON THE GROUPS? PLEASE GIVE REASONS FOR YOUR ANSWER.

Business sectors affected

109. We mentioned, at paragraph 97 above, that a change to the law could impact on a number of sectors. However, given the lack of available information, we have been unable to estimate costs.

110. No decisions have been made about legislative change. It is possible that such a change would have a particular impact on small businesses²⁹. However, there may be other sections of the business world which have particular concerns and we would welcome your views.

QUESTION 9: DO YOU HAVE ANY INFORMATION ABOUT HOW A CHANGE TO THE LAW WOULD IMPACT ON THE BUSINESS SECTOR?

Consultation within Government

111. Finally, it is vital that each of the identified options is thoroughly explored. In addition to seeking your views, we will also be raising the issues with colleagues in other departments and seeking their recommendations on the way forward.

²⁹ The Scottish Executive has suggested that small firms within the construction industry which employ carpenters, plumbers, electricians etc. could be affected.

QUESTIONNAIRE

QUESTION 1: Do you think information leaflets on pleural plaques would be useful? if not, why not?

QUESTION 2: Would you support the creation of a register? please give reasons for your answer.

QUESTION 3: Do you have any information on settlement figures and associated legal costs or any estimates regarding:

- the number of people currently diagnosed with pleural plaques;
- the future number of people who will develop pleural plaques;
- the future distribution of pleural plaques cases;
- the period of time over which people will develop pleural plaques;
- or
- the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation.

QUESTION 4: Do you think legislation should be introduced to overturn the decision in the Johnston case?

QUESTION 5: If you do think legislation should be introduced, would you favour legislation which —

- (d) restricts claims to those who had been diagnosed with pleural plaques before the Johnston case?;
- (e) allows anyone who has been diagnosed with pleural plaques to claim?;
- (f) follows the bill in Scotland by covering pleural plaques, pleural thickening and asymptomatic asbestosis?

QUESTION 6: Do you think there is a danger that legislation will create a privileged class of claimant or set an unhelpful precedent?

When answering the above questions, please give reasons for your views.

QUESTION 7: Do you support the option of a payment scheme for pleural plaques? if so, how would you see the scheme working? in particular, what level of payment would be appropriate and should a limitation period be applied?

QUESTION 8: Would any of the identified options lead to a higher or lower level of participation or uptake by the section 75 groups or have a differential impact on the groups? Please give reasons for your answer.

QUESTION 9: Do you have any information about how a change to the law would impact on the business sector?

QUESTION 10: Do you have any comments on the impact assessments prepared for England and Wales or Scotland?

THANK YOU FOR PARTICIPATING IN THIS CONSULTATION EXERCISE.

About you

Please use this section to tell us about yourself

| | |
|-------------------------------------------------------------------------------------------------------------------------|--|
| Full name | |
| Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.) | |
| Date | |
| Company name/organisation (if applicable): | |
| Address | |
| Postcode | |

Representative groups

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 12 January 2009 to:

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**Tel: 028 9025 1277
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Further hard copies of this consultation paper can be obtained from this address. It is also available on-line at www.dfpni.gov.uk

Alternative versions of this publication can be requested from the above address.

Publication of response

A paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at www.dfpni.gov.uk and may be accompanied by the responses which we receive. **This means your response may be disclosed. Before you submit your response, please read the paragraphs below on confidentiality of consultations. They will give you guidance on the legal position about any information given by you in response to this consultation.**

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The Code of Practice on the FOIA provides that:

Departments should only accept information from third parties in confidence if it is necessary to obtain information in connection with the exercise of any of the Department's functions and it would not otherwise be provided.

Departments should not agree to hold information received from third parties "in confidence" which is not confidential in nature.

Acceptance by Departments of confidentiality provisions must be for good reasons, capable of being justified to the Information Commissioner.

For further information about confidentiality of responses please contact the Information Commissioner's Office (or see website at: <http://www.informationcommissioner.gov.uk>)

ANNEX A

IMPACT ASSESSMENT

| Summary: Intervention & Options | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|-------------------------------------------------------|
| Department /Agency: Ministry of Justice | | Title: Impact Assessment of Pleural Plaques |
| Stage: Consultation | Version: Initial | Date: July 2008 |
| Related Publications: | | |
| Available to view or download at: http://www.justice.gov.uk/index.htm | | |
| Contact for enquiries: Joana Quina Telephone: 020 7210 8217 | | |
| <p>What is the problem under consideration? Why is government intervention necessary?</p> <p>In a unanimous decision on 17 October 2007, the House of Lords upheld the decision of the Court of Appeal of 26 January 2006 that the existence of pleural plaques does not constitute actionable or compensatable damage. The House of Lords judgment has led to pressure from representative groups, trade unions and MPs for the Government to take some action. There may be a need to provide clarification and reassurance regarding the nature of pleural plaques. The Government also wants to determine whether it would be appropriate to change the law of negligence, so that pleural plaques should be compensatable, or whether financial support should be offered to those diagnosed with pleural plaques due to workplace exposure to asbestos.</p> | | |
| <p>What are the policy objectives and the intended effects?</p> <p>To consider whether those who have pleural plaques should be enabled to obtain reassurance and support regarding the nature of pleural plaques. This would allow those people with pleural plaques to be helped and reassured and to allay concerns. In addition it would improve the wider public's understanding of the nature of pleural plaques. This support may, in addition, either include payments to those diagnosed with pleural plaques or enable those diagnosed with pleural plaques due to negligent exposure to asbestos to claim compensation through the civil courts as was the case before the Court of Appeal decision in <i>Rothwell v Chemical & Insulating Co Ltd</i> (and conjoined cases).</p> | | |

What policy options have been considered? Please justify any preferred option.

- 1 – Do nothing;
- 2 – Increasing support, help and information for people with pleural plaques;
- 3 – Changing the law of negligence;
- 4 – 'No fault' payments to those exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period prior to the House of Lords judgment who had not already received compensation;
- 5 – 'No fault' payments to those exposed to asbestos in the workplace and diagnosed with pleural plaques after as well as before the House of Lords judgment.

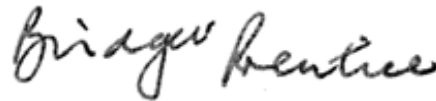
When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Improving support and public awareness of the nature of pleural plaques would commence in 2008/9. Changing the law or any financial support scheme would be likely to require legislation and would hence depend on the Parliamentary timetable. Any financial support scheme should be reviewed after two years. However, the full costs and benefits could take up to 20 years to be realised.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 8th July 2008

Summary: Analysis & Evidence

Policy Option: 2

Description: Increasing support, help and information for people with pleural plaques

| | | | |
|----------------------------------------------------------------|---------------------------------------------------|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COSTS | ANNUAL COSTS | | Description and scale of key monetised costs by 'main affected groups': Guidance and information would be provided to those diagnosed with pleural plaques. This would primarily be in the form of a leaflet distributed to those diagnosed, and the costs refer to the production and distribution of such leaflets. The costs would fall to Government. |
| | One-off (Transition) | Yrs | |
| | £ 0 | | |
| | Average Annual Cost (excluding one-off) | | |
| | £ 600-1,750 | 22 | Total Cost (PV) £ 10,000 – 30,000 |
| Other key non-monetised costs by 'main affected groups' | | | |

| | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------|------------|----------------------------------------------------------------------------------|
| BENEFITS | ANNUAL BENEFITS | | Description and scale of key monetised benefits by 'main affected groups' |
| | One-off | Yrs | |
| | £ 0 | | |
| | Average Annual Benefit (excluding one-off) | | |
| | £ 0 | | Total Benefit (PV) £ 0 |
| Other key non-monetised benefits by 'main affected groups' There would be clarification in terms of what a diagnosis of pleural plaques means. The wider public would also have a better understanding of the nature of pleural plaques. | | | |

Key Assumptions/Sensitivities/Risks

It is assumed that a diagnosis of pleural plaques is accompanied by a general state of anxiety and uncertainty about the implications in terms of the risks of developing a recognised asbestos-related disease. It is assumed that this anxiety could be reduced by increased understanding of the meaning of the diagnosis.

| | | | |
|-------------------------|-------------------------|--------------------------------------------------------|-----------------------------------------------------|
| Price Base Year 2008 | Time Period Years 22 | Net Benefit Range (NPV) £ -30,000 to -10,000 | NET BENEFIT (NPV Best estimate) £ -20,000 |
|-------------------------|-------------------------|--------------------------------------------------------|-----------------------------------------------------|

| | | | | |
|-----------------------------------------------------------------------|-------------------|--------------|---------------|--------------|
| What is the geographic coverage of the policy/option? | England and Wales | | | |
| On what date will the policy be implemented? | 2008/9 | | | |
| Which organisation(s) will enforce the policy? | N/A | | | |
| What is the total annual cost of enforcement for these organisations? | £ N/A | | | |
| Does enforcement comply with Hampton principles? | N/A | | | |
| Will implementation go beyond minimum EU requirements? | N/A | | | |
| What is the value of the proposed offsetting measure per year? | £ N/A | | | |
| What is the value of changes in greenhouse gas emissions? | £ N/A | | | |
| Will the proposal have a significant impact on competition? | No | | | |
| Annual cost (£-£) per organisation (excluding one-off) | Micro N/A | Small N/A | Medium N/A | Large N/A |
| Are any of these organisations exempt? | N/A | N/A | N/A | N/A |

| | | | | |
|-------------------------------------------------------|-------|-------------------|-----------------------|--|
| Impact on Admin Burdens Baseline (2005 Prices) | | | (Increase - Decrease) | |
| Decrease of | £ N/A | Net Impact | £ N/A | |

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

| Summary: Analysis & Evidence | | | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| Policy Option: 3 | | Description: Changing the law of negligence so that compensation can be claimed through the civil courts as was the case before the Court of Appeal decision | | |
| COSTS | ANNUAL COSTS | | Description and scale of key monetised costs by 'main affected groups': Those who were negligently exposed to asbestos in the workplace and are diagnosed with pleural plaques would be able to claim compensation through the civil courts. Compensation is assumed to be between around £11,500 and £13,400. Average legal costs are assumed to be around a total of £14,000. | |
| | One-off (Transition) | Yrs | | |
| | £ 0 | | | |
| | Average Annual Cost (excluding one-off) | | | |
| | £ 252m - 2,022m | 20 | Total Cost (PV) | £ 3,670m – 28,640m |
| Other key non-monetised costs by 'main affected groups' The impact on the courts of an increased number of claims. Danger of precedent in other areas. Uncertainty in the legal environment faced by business. | | | | |
| BENEFITS | ANNUAL BENEFITS | | Description and scale of key monetised benefits by 'main affected groups' | |
| | One-off | Yrs | | |
| | £ 0 | | | |
| | Average Annual Benefit (excluding one-off) | | | |
| | £ 0 | | Total Benefit (PV) | £ 0 |
| Other key non-monetised benefits by 'main affected groups' | | | | |

Key Assumptions/Sensitivities/Risks

There is a high level of uncertainty regarding the estimated number of future claims. Pleural plaques are asymptomatic and there may be a long latency period, so it is difficult to estimate with certainty the number of potential cases.

| | | | |
|-------------------------|----------------------------|---------------------------------------------------------|-----------------------------------------------------------------|
| Price Base Year 2008 | Time Period Years 20 | Net Benefit Range (NPV) £ -28,640m to -3,670m | NET BENEFIT (NPV Best estimate) £ -28,640m to -3,670m |
|-------------------------|----------------------------|---------------------------------------------------------|-----------------------------------------------------------------|

| | | | | |
|-----------------------------------------------------------------------|-------------------|--------------|---------------|--------------|
| What is the geographic coverage of the policy/option? | England and Wales | | | |
| On what date will the policy be implemented? | 2009/10 | | | |
| Which organisation(s) will enforce the policy? | N/A | | | |
| What is the total annual cost of enforcement for these organisations? | £ N/A | | | |
| Does enforcement comply with Hampton principles? | N/A | | | |
| Will implementation go beyond minimum EU requirements? | N/A | | | |
| What is the value of the proposed offsetting measure per year? | £ N/A | | | |
| What is the value of changes in greenhouse gas emissions? | £ N/A | | | |
| Will the proposal have a significant impact on competition? | No | | | |
| Annual cost (£-£) per organisation (excluding one-off) | Micro N/A | Small N/A | Medium N/A | Large N/A |
| Are any of these organisations exempt? | N/A | N/A | N/A | N/A |

| | | | | |
|--------------------------------|-----------------------|-------------|-------|-------------------------|
| Impact on Admin Burdens | (Increase - Decrease) | | | |
| Baseline (2005 Prices) | | | | |
| Increase of | £ N/A | Decrease of | £ N/A | Net Impact £ N/A |

Key: **Annual costs and benefits:** (Net) Present Value

Summary: Analysis & Evidence

| | |
|-------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Policy Option: 4 | Description: Financial support in the form of a 'no fault' payment for those diagnosed with pleural plaques, due to workplace exposure to asbestos, within a fixed period prior to the House of Lords decision on 17 October 2007 |
|-------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COSTS | ANNUAL COSTS | | Description and scale of key monetised costs by 'main affected groups': Those who were diagnosed with pleural plaques within a fixed period prior to the House of Lords judgment and had not received compensation would receive financial support. For the purposes of this initial impact assessment a figure of £5000 has been used. The financial support scheme would be funded either by insurers and Government on a pro-rata basis, or solely by the Government. The nature of the scheme would depend on the number of claims. The set-up costs for the scheme have not been included. |
| | One-off | Yrs | |
| | £ Not Available | | |
| | Average Annual Cost (excluding one-off) | | |
| | £ 52m – 196m | 1 | |
| Total Cost (PV) | | | £ 52m – 196m |
| Other key non-monetised costs by 'main affected groups' Danger of precedent in other areas. Uncertainty in the legal environment faced by business. | | | |

| | | | |
|-------------------------------------------------------------------|------------------------------------------------------|------------|------------------------------------------------------------------------------------------|
| BENEFITS | ANNUAL BENEFITS | | Description and scale of key monetised benefits by 'main affected groups' groups' |
| | One-off | Yrs | |
| | £ 0 | | |
| | Average Annual Benefit (excluding one-off) | | |
| | £ 0 | | |
| Total Benefit (PV) | | | £ 0 |
| Other key non-monetised benefits by 'main affected groups' | | | |

Key Assumptions/Sensitivities/Risks
 There is a high level of uncertainty regarding the estimated number of future claims. Pleural plaques are asymptomatic and there may be a long latency period, so it is difficult to estimate with certainty the number of potential cases.

| | | | |
|----------------------|----------------------|---------------------------------------------------|-----------------------------------------------------------|
| Price Base Year 2008 | Time Period Years 20 | Net Benefit Range (NPV) £ -196m to -52m | NET BENEFIT (NPV Best estimate) £ -196m to -52m |
|----------------------|----------------------|---------------------------------------------------|-----------------------------------------------------------|

| | | | | |
|----------------------------------------------------------------|--------------|--------------|---------------|--------------|
| What is the geographic coverage of the policy/option? | England and | | | |
| On what date will the policy be implemented? | 2010 | | | |
| Which organisation(s) will enforce the policy? | N/A | | | |
| What is the total annual cost of enforcement for these | £ N/A | | | |
| Does enforcement comply with Hampton principles? | N/A | | | |
| Will implementation go beyond minimum EU requirements? | N/A | | | |
| What is the value of the proposed offsetting measure per year? | £ N/A | | | |
| What is the value of changes in greenhouse gas emissions? | £ N/A | | | |
| Will the proposal have a significant impact on competition? | No | | | |
| Annual cost (£-£) per organisation (excluding one-off) | Micro N/A | Small N/A | Medium N/A | Large N/A |
| Are any of these organisations exempt? | N/A | N/A | N/A | N/A |

| | | | | |
|-------------------------------------------------------|-------|-------------|-------|----------------------------|
| Impact on Admin Burdens Baseline (2005 Prices) | | | | (Increase - Decrease) |
| Increase of | £ N/A | Decrease of | £ N/A | Net Impact £ N/A |

Key: **Annual costs and benefits:** (Net) Present Value

| Summary: Analysis & Evidence | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Policy Option: 5 | | Description: Financial support in the form of a “no fault” payment for those diagnosed with pleural plaques, due to workplace exposure to asbestos, both before and after the House of Lords decision on 17 October 2007 | |
| COSTS | ANNUAL COSTS | | Description and scale of key monetised costs by ‘main affected groups’ Those diagnosed with pleural plaques as in option 4 and also those diagnosed with pleural plaques after the House of Lords judgment would receive financial support. For the purposes of this initial impact assessment a figure of £5000 has been used. The costs of these payments could fall to both the private and public sectors, according to the estimated number of claims for each sector. It is also possible that Government would be the sole source of funding. The set-up costs for the scheme have not been included. |
| | One-off | Yrs | |
| | £ Not Available | | |
| | Average Annual Cost (excluding one-off) | | |
| | £ 54m – 330m | 1 | |
| | | Total Cost (PV) | £ 780m – 4,762m |
| Other key non-monetised costs by ‘main affected groups’ Danger of precedent in other areas. Uncertainty in the legal environment faced by business. | | | |
| BENEFITS | ANNUAL BENEFITS | | Description and scale of key monetised benefits by ‘main affected groups’ groups’ |
| | One-off | Yrs | |
| | £ 0 | | |
| | Average Annual Benefit (excluding one-off) | | |
| | £ 0 | | |
| | | Total Benefit (PV) | £ 0 |
| Other key non-monetised benefits by ‘main affected groups’ | | | |
| Key Assumptions/Sensitivities/Risks | | | |
| There is a high level of uncertainty regarding the estimated number of future claims. Pleural plaques are asymptomatic and there may be a long latency period, so it is difficult to estimate with certainty the number of potential cases. | | | |
| Price Base Year 2008 | Time Period Years 20 | Net Benefit Range (NPV) £ -4,762m to -780m | NET BENEFIT (NPV Best estimate) £ -4,762m to -780m |
| What is the geographic coverage of the policy/option? | | | England and Wales |
| On what date will the policy be implemented? | | | 2010 |
| Which organisation(s) will enforce the policy? | | | N/A |
| What is the total annual cost of enforcement for these | | | £ N/A |
| Does enforcement comply with Hampton principles? | | | N/A |

| | | | | |
|----------------------------------------------------------------|-------------------|-------------------|--------------------------------|--------------|
| Will implementation go beyond minimum EU requirements? | | N/A | | |
| What is the value of the proposed offsetting measure per year? | | £ N/A | | |
| What is the value of changes in greenhouse gas emissions? | | £ N/A | | |
| Will the proposal have a significant impact on competition? | | No | | |
| Annual cost (£-£) per organisation (excluding one-off) | Micro N/A | Small N/A | Medium N/A | Large N/A |
| Are any of these organisations exempt? | N/A | N/A | N/A | N/A |
| Impact on Admin Burdens Baseline (2005 Prices) | | | | |
| Increase of £ N/A | Decrease of £ N/A | Net Impact | (Increase - Decrease) £ N/A | |

Key: **Annual costs and benefits:** (Net) Present Value

Evidence Base

Contents:

1. Background
2. The need for a Government response to the House of Lords decision that pleural plaques are not actionable or compensatable damage under the civil law of negligence.
3. Sectors and Groups Affected.
4. Options

Do nothing;

Increasing support, help and information for people with pleural plaques;

Changing the law of negligence, so that those diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able to claim compensation through the civil courts in the same way as was the case prior to the Court of Appeal decision in *Rothwell*;

A statutory no fault scheme to provide a payment to those who could show that they had been diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 and had not already received compensation;

A statutory no fault scheme to provide a payment to those people as in the option above and also to those diagnosed with pleural plaques following the judgment or in the future.

5. Costs and Benefits of the Proposals.
6. Specific Impact Tests.

This Impact Assessment provides an initial assessment of the different options for Government action following the House of Lords decision in *Johnston v NEI International Combustion Ltd and conjoined cases* (known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*).³⁰

³⁰ [2007] UKHL 39. The judgment can be found at <http://www.parliament.the-stationery-office.co.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>

Background

1. Pleural plaques are small localised areas of fibrosis found within the pleura (the membrane surrounding the lungs) caused by asbestos exposure. This does not usually cause significant symptoms (if any) and does not impair lung function. Pleural plaques are in themselves benign but are a marker of exposure to asbestos. As pleural plaques are entirely internal, they are invisible and are discoverable only by x-ray or CT scan. Pleural plaques are usually diagnosed incidentally in the course of medical investigations of other conditions.
2. On the basis of certain High Court decisions in the 1980s, it was possible for claimants to be awarded damages for negligent exposure to asbestos which had led to the presence of pleural plaques. A successful claim typically received an award of provisional damages of between £5,000 and £7,000 (leaving open the possibility of a further claim if the claimant subsequently developed an asbestos-related disease), or a full and final award of between £12,500 and £20,000.
3. The interpretation by the High Court of the law in this area was not challenged until 2004, when the insurance industry brought the case of *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*. The insurers' decision to mount a challenge was based on two essential grounds: first, that no claimant had suffered an injury sufficient to found a claim in negligence; and second, that in so far as there was any such injury, the present level of quantum (i.e., the amount of damages awarded) was far too high.
4. In the initial decision in *Rothwell* in February 2005, the High Court³¹ held that pleural plaques were compensatable, but reduced the amount normally payable to provisional damages of £4,000 or full and final damages of £7,000 (except where special damages were in issue or the award included an element for a recognised psychiatric illness). The insurers appealed against the judgment, and on 26 January 2006 the Court of Appeal³² found in their favour and held that pleural plaques were not compensatable. This decision was appealed by four of the claimants to the House of Lords.
5. In a unanimous decision on 17 October 2007, the House of Lords upheld the Court of Appeal decision that the existence of pleural plaques does not constitute actionable or compensatable damage.
6. The judgment confirms that if the claimants were to develop any recognised asbestos-related disease in future they would then have a claim in respect of that disease. Compensation is already available for a range of asbestos-related diseases such as mesothelioma, asbestosis, pneumoconiosis and asbestos-related lung cancer.

³¹ [2005] EWHC 88 (QB)

³² [2006] EWCA Civ 27

7. The Consultation Paper to which this Impact Assessment refers considers the actions that the Government might take following the House of Lords decision. It presents four policy options in terms of a Government response.

The need for a Government response to the House of Lords' decision that pleural plaques are not actionable or compensatable damage under the civil law of negligence

8. The Government has received strong representations that it should respond to the House of Lords decision that the existence of pleural plaques does not constitute actionable or compensatable injury. In particular, arguments have been put forward that the Government should overturn the judgment by changing the law of negligence, so that those diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able to claim compensation through the civil courts in the same way as was the case prior to the Court of Appeal decision in *Rothwell*. While the consultation paper invites views on overturning the judgment, the Government is not currently minded to favour this approach, not least because of the implications for the fundamental integrity of the law of negligence.
9. The Government acknowledges that, although pleural plaques are not in themselves harmful, a diagnosis of pleural plaques is likely to cause anxiety. It proposes that it is both appropriate and important to improve public understanding of pleural plaques, and in particular to provide support and reassurance to those diagnosed with pleural plaques. This support could be in the form of the provision of clarification and reassurance regarding the nature of pleural plaques. The Government also wants to determine whether it is appropriate to change the law of negligence or to provide financial support by enabling the award of no fault payments for those who have developed pleural plaques from workplace exposure to asbestos.

Sectors and Groups Affected

10. People diagnosed with pleural plaques will normally have had workplace exposure to asbestos. Workplace exposure to asbestos tends to be greater within industries associated with heavy industrial use of asbestos in the past, for example shipbuilding, construction, steel, railway engineering and the insulation industry. In addition, these industries tend to be associated with certain geographical areas, such as the North East. However, it should be noted that workplace exposure to asbestos may also have occurred across a wider range of occupations and industries.

11. The main groups affected are employers/former employers (including Government), insurers, and those diagnosed with pleural plaques.

Options

Option 1 – Do nothing

12. Under this option, those diagnosed with pleural plaques would not receive any financial support. No educational initiatives, such as a communication campaign to improve public understanding of the nature of pleural plaques, would be undertaken.

Option 2 – Increasing support, help and information for people with pleural plaques

13. This option acknowledges that, because the nature of pleural plaques is often misunderstood, there is a need to improve understanding not only for those diagnosed with pleural plaques, but also for the wider public. This option considers developing initiatives to raise awareness of the medical evidence in relation to pleural plaques in order to allay concerns. This could take the form of distributing leaflets which would clarify the nature of pleural plaques and the medical evidence. Such leaflets could be made available, for example, through doctors, hospitals, trade unions, and Citizens Advice Bureaux (CABs). Guidance could also be issued to doctors and use made of websites to provide information.

Option 3 – Changing the law of negligence

14. Under this option, those diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able to claim compensation through the civil courts in the same way as was the case prior to the Court of Appeal decision in *Rothwell*. To ensure that all those affected by the decision could receive compensation, the legislation would need to be retrospective and to apply to the cases included in the decision itself and all cases where there had been no judgment or settlement prior to the House of Lords decision. This would include all those whose cases had been stayed pending the House of Lords decision or the Court of Appeal decision, or had been withdrawn/discontinued, or who had not commenced proceedings because of the Court of Appeal or House of Lords decision.

Option 4 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007, who had not already received compensation

15. Under this option, those exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period, say five years, prior to the House of Lords judgment and who had not already received compensation would receive financial support. The Consultation Paper seeks views on what level of payment would be appropriate, but for the purpose of this Impact Assessment, a figure of £5,000 has been used. All those whose cases had been stayed pending the House of Lords or Court of Appeal decision, or had been withdrawn/discontinued, or who had not commenced proceedings because of the Court of Appeal or House of Lords decision, as well as the cases included in the decision, would be eligible for a payment. The no fault scheme would be funded either by insurers and Government on a pro-rata basis on the number of claims, or funded fully by Government. A limitation period of one year (within which all claims would have to be made) would apply.

Option 5 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 and who had not already received compensation, and also to those diagnosed with pleural plaques since the judgment and in the future

16. Under this option, those exposed to asbestos in the workplace and diagnosed with pleural plaques both within a fixed period prior to the House of Lords judgment and subsequently would receive financial support in the form of a payment of £5,000 each, as in the previous option. Also as in the previous option, the no fault scheme would be funded either by insurers and Government on a pro-rata basis on the number of claims, or funded fully by Government. A limitation period would apply, and would consist of one year from the date of commencement of the scheme for cases already diagnosed and one year from the date of diagnosis for new cases.

Costs and benefits of the options

Option 1 – Do nothing

Benefits

17. There would be no benefits to those diagnosed with pleural plaques (both currently and in the future). In the context of options 3, 4 and 5, employers/former employers (including Government) and insurers would not have to pay compensation or make any no fault payment.

Costs

18. Under this option, there would be a continued lack of awareness by those diagnosed with pleural plaques and the wider public as to the nature of pleural plaques. There would be a continued lack of understanding of the medical evidence relating to pleural plaques, and

any anxiety felt by those diagnosed and their families would not be reduced.

Option 2 – Increasing support, help and information for people with pleural plaques

Benefits

19. This option would demonstrate a clear commitment from Government to ensuring that both those diagnosed with pleural plaques and the wider public gain a clearer and better understanding of the meaning of a diagnosis of pleural plaques. It would raise awareness of the medical evidence in relation to pleural plaques and it would help to allay concerns. It would, therefore, also contribute towards reducing the anxiety felt by those diagnosed with pleural plaques, as well as their families.
20. Given the long latency of pleural plaques, any leaflets or advice would need to be reviewed, say every two or three years. This means that not only would new medical research be continually and consistently monitored, but also any new evidence related to pleural plaques would be communicated in a transparent way. This would provide added reassurance to those diagnosed.

Costs

21. A package of support could take the form of distributing leaflets providing information on pleural plaques. The leaflet would explain in clear terms the nature of pleural plaques and the medical evidence. Such leaflets could be made available, for example, through doctors, hospitals, trade unions, and CABs. It is expected that it will be necessary to review the leaflets periodically, say every two or three years, to account for any changes either in medical evidence, or updating other details such as those for where to go for more support and advice.
22. The cost of producing and distributing each set of the leaflets would naturally depend on the numbers produced. In determining the costs it is essential to have an estimate of the number of those likely to be diagnosed with pleural plaques. It is also necessary to have information in terms of the distribution over time, or profile, of those diagnoses. There are no statistics on the total number of those people with confirmed diagnoses of pleural plaques. This is largely due to the asymptomatic nature of pleural plaques, as well as the long latency. It is important to acknowledge the uncertainty regarding the number of those who will develop pleural plaques, and that it is not possible to provide a definitive estimate.

23. It is possible, however, to examine two different approaches for determining the number of people with pleural plaques. One approach is to look at statistics available on the number of cases of pleural plaques diagnosed incidentally during the course of medical examinations of other conditions. The other approach is to attempt to estimate the number of people who will ultimately develop pleural plaques – this can be approximated by estimating the number of people with occupational exposure to asbestos, then estimating the proportion that would develop pleural plaques, and then estimating the number that is likely to be diagnosed.

Pleural plaques diagnoses obtained in the course of medical examinations of other conditions:

24. Reports made by respiratory physicians participating in the Surveillance of Work-related and Occupational Respiratory Disease (SWORD) scheme, which is part of the Health and Occupation Reporting (THOR) network run by Manchester University³³ include estimated annual numbers of new cases of benign pleural disease (which includes pleural plaques). The vast majority of the cases of benign pleural disease (96–99%) were seen by chest, rather than occupational, physicians. About three-quarters of the estimated cases of benign pleural disease were classified as “predominantly plaques”. On this basis, it is estimated that over the five-year period 2002–2006, there were around 4,500 cases of pleural plaques, giving an average of around 900 cases per year.
25. It is important to note that the cases of pleural plaques identified by SWORD are likely to substantially underestimate the number of people with pleural plaques. Given that pleural plaques are asymptomatic and few of the cases reported to SWORD had other diagnoses of asbestos-related disease in addition to plaques, this suggests that many of these cases were identified via chest x-rays following referral of individuals to chest physicians for other respiratory conditions, rather than because of the plaques themselves. So the figure of 900 cases per year should be taken at best as a lower bound for the cases of pleural plaques diagnosed each year.

Pleural plaques diagnoses taking into account underlying epidemiological conditions:

26. The following paragraphs describe a possible methodology, including the assumptions made,³⁴ which has been suggested by a company operating in the insurance sector. Whilst the Association of British Insurers (ABI) has indicated that it is not able to provide meaningful figures on the number of people with pleural plaques, it has indicated

³³ More details can be found at <http://www.medicine.manchester.ac.uk/coeh/thor/>.

³⁴ Except the assumptions on the proportion of those with pleural plaques who will be diagnosed. The initial assumption proposed was 100%.

informally that this methodology provides a reasonable approach to estimating the number of people who will ultimately develop pleural plaques.

27. Although there are currently no studies that provide a specific estimate for the number of workers exposed to asbestos in the UK, it is possible to obtain an approximation by using comparable figures for the US. It is widely cited that in the period 1940–1980, 27.5 million workers were occupationally exposed to asbestos.³⁵ This equates to 14.6% of the US population at the mid-point of this period. Applying the same proportion to the UK yields an occupational exposure of around 7.7 million. By taking into account the number of people who have died (from all causes) this number is likely to be reduced to around four to five million.
28. A number of studies provide estimates for the proportion of workers occupationally exposed to asbestos who develop pleural plaques.³⁶ On the basis of such studies, it would appear reasonable to estimate that 25% to 50% of those with occupational exposure to asbestos ultimately develop pleural plaques. Combining these estimates with the ones in the paragraph above of four to five million, would yield a range of 1 million to 2.5 million potential people with pleural plaques.
29. It is unlikely that everyone occupationally exposed to asbestos and who developed pleural plaques would be scanned and diagnosed – pleural plaques are asymptomatic, and clinicians determine whether x-rays or CT scans are necessary on a case-by-case basis. In addition, there are regulations, which apply equally to the NHS and the private sector, governing when an x-ray or CT scan can be taken.³⁷ To take into account that not everyone who has pleural plaques will be diagnosed, we assume that between 20% and 50% of those who have pleural plaques will be diagnosed. This means that there may be between 200,000 and 1.25 million diagnoses of pleural plaques.
30. As can be clearly verified from the information in the paragraphs above, there is a high level of uncertainty regarding the numbers of pleural plaques diagnoses, and this is transposed into a wide range for the estimates. Consequently, at this stage we have estimated that the number of leaflets produced and distributed could vary between 5,000 and 50,000, and they would be published and distributed every two

³⁵ Nicholson WJ, G Perkel and IJ Selikoff (1982), "Occupational Exposure to Asbestos: Population at Risk and Projected Mortality – 1980–2030", *Am J Ind Med*, 3:259-311.

³⁶ Examples include:

Chapman, SJ et al (2003), "Benign Asbestos Pleural Disease", *Curr Opin Pulm Med*, 9(4), 266-271;

American Thoracic Society (2004), "Diagnosis and initial management of non-malignant diseases related to asbestos", *Am J Respir Crit Care Med*, 170, 691-715;

Chailleux, E. and M. Letourneux (1999), "Medical Impact of the Screening of Asbestos-Related Benign Pleural Lesions", *Rev Mal Respir*, Vol. 16, pp. 1286-1293;

³⁷ The Ionising Radiation (Medical Exposure) Regulations 2000; The Justification of Practices Involving Ionising Radiation Regulations 2004.

years over 22 years (starting in 2008 and lasting for a further 20 years – see paragraph 35 for more details). Accordingly, the total costs could range between around £10,000 and £30,000 in present value terms. The cost of producing and distributing these leaflets would be absorbed within Government departmental budgets.

Option 3 – Changing the law of negligence

Benefits

31. This option would meet the concerns of those who have made strong representations that people with pleural plaques should be able to claim compensation through the civil courts. However, difficulties could arise from Government interference with the Law Lords' decision. One of the difficulties is the need for retrospective provisions in legislation that would overturn the House of Lords judgment, which could potentially raise issues in relation to the European Convention on Human Rights, on the basis that those provisions interfered with settled arrangements in a way which could be argued to breach the Convention.
32. Given that this option would be considered in addition to the option of raising awareness of the nature of pleural plaques, there would also be the benefit under that option of a clearer and better understanding of the meaning of a diagnosis of pleural plaques, which would help to allay concerns and any anxiety. However, there is also the risk that the combination of a campaign to raise awareness of the benign nature of pleural plaques, coupled with changing the law of negligence so that those with a diagnosis could claim compensation, could lead to some confusion.

Costs

33. In order to estimate the potential costs of this option, we have assumed low to high scenarios for the amount that is awarded in compensation. These assumptions are based on the UK Asbestos Working Party 2004 report,³⁸ which assumed an average cost to insurers of settling a pleural plaques claim of £11,000 in 2004, as well as claims inflation rates of 1% (low), 3% (medium) and 5% (high). At 2008 prices, compensation is, therefore, assumed to be between £11,500 and £13,400. In addition, we have assumed average total legal costs of around £14,000 per claim (£8000 for claimants and £6000 for defendants).³⁹ We have assumed that this option would be implemented in 2009/10, due to the need for primary legislation.

³⁸ UK Asbestos – The Definitive Guide, available at http://www.actuaries.org.uk/__data/assets/pdf_file/0004/34969/Lowe.pdf.

³⁹ Financial Memorandum to Damages (Asbestos-Related Conditions) (Scotland) Bill

34. Because of the additional retrospective element of this option, it is necessary to include both the number of cases that had been stayed pending the House of Lords or Court of Appeal decision, as well as future cases. In terms of stayed cases, we understand that there are around 1,500 cases relating to the main Government departments affected, i.e., the Ministry of Defence (MOD); the Department for Business, Enterprise and Regulatory Reform (DBERR), and the Department of Transport, (DfT). We have not been provided with the number of stayed cases for insurers. We have made the assumption that there are approximately 5,000 cases.
35. As was mentioned previously, it is not possible to provide definitive estimates on either the ongoing incidence of pleural plaques or the timescale over which they will arise. The importing and use of new asbestos was banned in November 1999. Pleural plaques are not usually detected during the first 20 years following exposure to asbestos, and it has been indicated that cases will appear at least until 2024. For the purposes of estimating the possible costs of compensation for pleural plaques, it has been assumed claims will arise over a period of 20 years. Although there is no certainty as to the incidence of pleural plaques over time, it is unlikely that cases will be uniformly distributed, and it is more likely that cases will instead increase up to a certain point and then start to decrease until they tail off. As such, we have assumed that around 60% of cases will occur by 2019 (with cases peaking at around 2015), and that around 90% of cases will occur by 2024, with the remainder tailing off by 2029.

Question 6: Do you have any estimates regarding the future distribution of pleural plaques cases, including the period of time over which people will develop pleural plaques?

36. In terms of the number of future cases falling to the main Government departments affected (MOD, BERR, DfT), these have been estimated at around 10,500. In terms of the numbers of future cases falling to the private sector, at paragraph 29 we estimated that the total number of future diagnoses of pleural plaques could range between 200,000 and 1.25 million. We assume that once a person has been diagnosed with pleural plaques, they will make a claim. So the total number of claims falling on both the public and private sector would be 200,000 to 1.25 million.
37. Including both stayed and future cases, the present value of the cost of compensation and legal costs ranges between £3,670 million and £28,640 million. It is, however, important to acknowledge that the uncertainty in the possible number of claims, with the added complexity of the distribution of the claims, as well as uncertainty regarding claims inflation, will necessarily have an effect on the estimated costs.

38. There may be an incentive for individuals to seek x-rays or CT scans. However, as previously referred at paragraph 29, the use of x-rays and CT scans is governed by regulations and these tests must be justified by the practitioner. As these regulations apply to both the NHS and the private sector, we would expect that this would mitigate the possibility of any x-ray or scan being carried out in the absence of a clear medical need.
39. In addition, businesses operating in the UK have expectations of a fair and transparent legal environment that could be adversely affected by a decision to overturn the House of Lords judgment.

Option 4 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 who had not already received compensation

Benefits

40. Under a 'no fault' scheme with a fixed sum payable for diagnoses prior to the House of Lords judgment, those who had been diagnosed within a fixed period, say five years, before the House of Lords decision was published, and who had an expectation of receiving compensation would have this expectation realised and would have certainty in terms of a fixed payment.
41. Given that this option of financial support would be considered in addition to the option of raising awareness of the nature of pleural plaques, there would also be the benefit under that option of a clearer and better understanding of the meaning of a diagnosis of pleural plaques, which would help to allay concerns and any anxiety.
42. As the payment would be made on a no fault basis to people exposed in the workplace there would be no need to prove liability, and it would be a simple process for the claimant to receive payment. The claimant would only need to provide evidence of the diagnosis of pleural plaques, proof of their identity, and that they had worked in an environment where they had been exposed to asbestos. This simplicity, and consequent speed of the process, would be an added benefit.

Costs

43. The Consultation Paper seeks views on what level of payment is appropriate, but in order to estimate the potential costs of this option, we have assumed a fixed payment of £5,000. This amount is based on the possible bracket of £4,000 – £6,000 that was discussed in the

Court of Appeal judgment in *Rothwell* (although a definitive view was not taken given the decision that pleural plaques were not compensatable). Because of the no fault nature of the scheme and the simple evidential requirements, the scheme would not involve any significant legal costs.

44. In terms of the number of cases that had been stayed pending the House of Lords or Court of Appeal decision, as referred to in paragraph 34, we consider there are approximately 6,500 cases, with 5,000 falling to insurers, and the remainder to the main Government departments affected, MOD, DBERR, and DfT.
45. In addition to the cases stayed pending the House of Lords or Court of Appeal decision, the financial support scheme under this option would also provide for a fixed payment to those *diagnosed* with pleural plaques following workplace exposure to asbestos, who might not have commenced proceedings because of the Court of Appeal or House of Lords decision. Although it is extremely difficult to provide a reliable estimate of how many cases may have been diagnosed, but for which no compensation was received, within a fixed period (which we are assuming to be five years), we attempt to provide an approximation for a possible range of estimates.
46. As referred to in paragraph 24, the Health and Occupation Reporting (THOR) network run by Manchester University includes estimated annual numbers of new cases of benign pleural disease (which includes pleural plaques). It is estimated that in the period 2002–2006, there were an average of around 900 cases per year. This would give approximately 4500 cases for diagnoses of pleural plaques five years prior to the House of Lords decision. Note that this figure does not exclude those people who were diagnosed and received compensation during that period. This is likely to be more of an issue for the period before the Court of Appeal decision. In addition, as was referred to at paragraph 25, the cases of pleural plaques identified by SWORD are likely to underestimate the number of diagnoses. Therefore, these estimates provide one approximation of a lower bound for the diagnoses for the five years prior to the House of Lords decision.
47. Another way of providing an approximation is to use the estimates available from the UK Asbestos Working Party 2004 report.⁴⁰ This report provided projections of the number of pleural plaques claims that were expected to be filed each year, as well as the estimated average cost of settling those claims. The projections of the number of expected claims were made on the basis of subjective judgement, and were based on projections of legal claims rather than taking into account underlying epidemiological considerations. Projections of pleural plaques/thickening claims (where the vast majority, c. 90% refer to

⁴⁰ UK Asbestos – The Definitive Guide, available at http://www.actuaries.org.uk/__data/assets/pdf_file/0004/34969/Lowe.pdf.

pleural plaques) were provided for scenarios of low, medium and high future numbers of claims. The low scenario assumed there would be 19,000 claims; the medium scenario assumed there would be 63,000 claims; and the high scenario assumed there would be 104,000 claims. The number of pleural plaques claims were estimated from survey responses by insurers. For the two-year period between the Court of Appeal and House of Lords decisions, it was estimated that between 5,000 for the low scenario, 22,000 for the medium scenario and 32,000 for the high scenario pleural plaques claims could be filed. To obtain a figure for the remaining years (to make up the five year period being considered), we add these projections to a further 2700 diagnoses (estimated from the SWORD data, as above).

48. Combining these estimates would provide a range of between around 11,000 and 41,200 potential applicants under this option. We acknowledge the high level of uncertainty of these estimates, but believe that in the absence of better information it is more appropriate to consider these estimates rather than ignoring the set of people who were diagnosed yet did not receive compensation. During the course of this consultation the Government will undertake further analysis in relation to the number of people diagnosed before the Law Lords' decision, to better inform the evidence base.

Question 7: Do you have any estimates regarding the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation?

49. We have assumed that the scheme could not be implemented before 2010. This is due to the need to legislate and then to set up the scheme. In addition, it is assumed that a limitation period of one year applies, so that the scheme will only run for not much longer than one year. For a payment of £5,000, the present value of the cost of the payments ranges between £52 million and £192 million. We have also provisionally estimated the costs of administering the scheme. On the basis that the criteria for the lump sum payments in this scheme would be similar to those under the Pneumoconiosis etc (Workers' Compensation) Act 1979, the present value of the staff costs in administering it would be in the range of around £0.5 million to £2 million, depending on location and number of claims. Office occupancy costs have been provisionally estimated at between £0.1 million and £1 million. It is important to acknowledge that the uncertainty in the possible number of claims will necessarily have an effect on all the estimated costs. At this stage it is not possible to provide a reasonable estimate for the costs of setting up this scheme.
50. There is the risk that the introduction of a no fault scheme in this area could create a precedent and lead to calls for Government to introduce no fault schemes in a range of other areas.

51. It is envisaged that the scheme would be funded by insurers and Government on a pro-rata basis. However, insurers may be reluctant to provide any funding on a voluntary basis, so that any actual requirement to pay would be likely to need primary legislation. The alternative would be for Government to be the sole provider of funding for the scheme.

Option 5 – Financial support in the form of a no fault payment to people exposed to asbestos in the workplace and diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision on 17 October 2007 and who have not already received compensation, and also to those diagnosed with pleural plaques since the judgment and in the future

Benefits

52. Similarly to the previous option, this financial support option would be considered in addition to the option of raising awareness of the nature of pleural plaques. As such, there would be the benefit of that option of a clearer and better understanding of the meaning of a diagnosis of pleural plaques, which would help to allay concerns and anxiety. However, there is also the risk that the combination of a campaign to raise awareness of the benign nature of pleural plaques, coupled with financial support for those with a diagnosis could lead to some confusion.
53. The benefit of meeting settled expectations that could be used to justify awarding payments to those diagnosed with pleural plaques prior to the House of Lords decision does not apply to diagnoses following the decision.

Costs

54. As in the case of the previous financial support option, we have assumed a fixed payment of £5,000, and that the scheme would only be implemented in 2010. As was mentioned previously, it is not possible to provide definitive estimates on either the ongoing incidence of pleural plaques or the timescale over which they will arise. For the reasons provided at paragraph 35, we assume that the financial support scheme would need to be in place for a period of 20 years, and that during this time the number of cases will increase up to around 2015 and then start decreasing until they tail off by 2029.
55. As detailed at paragraph 36, the total number of future claims falling on both the public and private sector is assumed to be between 200,000 and 1.25 million.
56. Including the cases considered under the previous financial support option (i.e., those diagnosed with pleural plaques before the date of the House of Lords decision on 17 October 2007), and all future cases, for

a payment of £5,000, the present value of the cost of the payments ranges between £768 million and £4,667 million. Taking into account the staff costs in administering the scheme, as well as the office occupancy costs the present value would be in the range of around £12 million to £95 million, depending on location and number of claims. As was the case with the previous option, it is important to acknowledge that the uncertainty in the possible number of claims, with the added complexity of the distribution of the claims, will necessarily have an effect on all the estimated costs. At this stage it is not possible to provide a reasonable estimate for the costs of setting up this scheme.

57. The points made in paragraphs 50 and 51 also apply to this option.
58. Any incentives for individuals to seek x-rays or CT scans and for these to be carried out without a clear medical need would be mitigated by regulations on the use of these tests, as referred to at paragraphs 29 and 38.

Competition Assessment

59. Under option 3, the retrospective elements could potentially raise issues in relation to the European Convention of Human Rights, on the basis that they interfered with settled arrangements in a way which could be argued to breach the Convention. In addition, under options 4 and 5 a payment scheme, depending on who would be required to fund it, could also raise issues in relation to the ECHR. In addition, if firms are faced with elements of uncertainty regarding the legal environment they face, then this could affect future decisions on location, and therefore be damaging for businesses, and ultimately detrimental to the UK economy. It is, therefore, important to recognise the strategic risk in terms of the impact on the business community of pursuing any option that would entail the award of compensation or no fault payments.
60. If insurers were required by legislation either to contribute towards the funding of the financial support schemes (for both the payment of awards and setting up/administering of the schemes), or made liable for compensation if the House of Lords judgment were overturned, then there is the possibility that this requirement might lead insurers to charge higher premiums for employers' liability compulsory insurance. This risk is arguably greater under the option of changing the law of negligence, as there is high uncertainty as to the number of claims, and the compensation and legal costs would be higher.

Small Firms Impact Test

61. As referred to in the Competition Assessment above, if insurers are either required to contribute towards the funding of a financial support scheme that awards payments to those diagnosed with pleural plaques

or to pay compensation following a change in the law of negligence, this may have an effect on insurance premiums. This may have an effect on small firms.

Legal Aid Test

62. The option of changing the law of negligence is the only one for which the legal aid test might be applicable. However, with the exception of clinical negligence cases, personal injury cases are generally not eligible for legal aid. Therefore, the funding for claims for compensation would be primarily through Conditional Fee Agreements, and there would be no impact on legal aid.

Health Impact Assessment

63. Pleural plaques can only be diagnosed by an x-ray or CT scan. There could be an incentive under options 3 and 5 for individuals to seek x-rays and CT scans. However, Paragraph 58 explains that the use of x-rays and CT scans is governed by regulations and that these tests must be justified by the practitioner. This would mitigate the possibility of any x-ray or scan being carried out in the absence of a clear medical need.

Race, Disability and Gender Assessment

64. As occupational exposure to asbestos affects primarily men, there will be no major impact on gender equality. Equally, it is anticipated there will be no major impact upon disabled or minority groups.

Human Rights Assessment

65. The retrospective elements of option 3 could potentially raise issues in relation to the European Convention of Human Rights on the basis that they interfered with settled arrangements in a way which could be argued to breach the Convention. The payment schemes in options 4 and 5 could, depending on who would be required to fund them, also raise issues in relation to the European Convention of Human Rights. In relation to all these options, it would be necessary to assess the proportionality of any such interference and the likely effect any change would have, against the justification for the interference.

Specific Impact Tests: Checklist

| Type of testing undertaken | <i>Results in Evidence Base?</i> | <i>Results annexed?</i> |
|----------------------------|----------------------------------|-------------------------|
| Competition Assessment | Yes | No |
| Small Firms Impact Test | Yes | No |
| Legal Aid | Yes | No |
| Sustainable Development | N/A | N/A |
| Carbon Assessment | N/A | N/A |
| Other Environment | N/A | N/A |
| Health Impact Assessment | Yes | No |
| Race Equality | Yes | No |
| Disability Equality | Yes | No |
| Gender Equality | Yes | No |
| Human Rights | Yes | No |
| Rural Proofing | N/A | N/A |

ANNEX B

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

ANNEX C

Damages (Asbestos-related Conditions) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

1 Pleural plaques

(1) Asbestos-related pleural plaques are a personal injury which is not negligible.

(2) Accordingly, a person who has them may recover damages in respect of them from a person liable for causing them.

(3) Any rule of law the effect of which is that asbestos-related pleural plaques are not a personal injury or are negligible ceases to apply to the extent it has that effect.

(4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable for causing (or materially contributing to the development of) a personal injury.

2 Pleural thickening and asbestosis

(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused, is not causing or is not likely to cause impairment of a person's physical condition is a personal injury which is not negligible.

(2) Those conditions are—

- (a) asbestos-related pleural thickening; and
- (b) asbestosis.

(3) Accordingly, it is not necessary for a person seeking damages in respect of asbestos related pleural thickening or asbestosis to prove that it has caused, is causing or is likely to cause impairment of the person's physical condition.

(4) But where a person seeking damages claims, in relation to the amount of damages sought, that the thickening or asbestosis has caused, is causing or is likely to cause such impairment, it remains for the person to prove those matters.

3 Limitation of actions

(1) This section applies to an action of damages for personal injuries—

(a) in which the damages claimed consist of or include damages in respect of—

- (i) asbestos-related pleural plaques; or
- (ii) a condition mentioned in section 2(2) which has not caused, is not causing or is not likely to cause impairment of a person's physical condition; and

(b) which, in the case of an action commenced before the date this section comes into force, has not been determined by that date.

(2) For the purposes of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (limitation in respect of actions for personal injuries), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4 Commencement and retrospective effect

(1) This Act (other than this subsection and section 5) comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.

(2) Sections 1 and 2 are to be treated for all purposes as having always had effect.

(3) But those sections have no effect in relation to—

(a) a claim which is settled before the date on which subsection (2) comes into force (whether or not legal proceedings in relation to the claim have been commenced); or

(b) legal proceedings which are determined before that date.

5 Short title and Crown application

(1) This Act may be cited as the Damages (Asbestos-related Conditions) (Scotland) Act 2008.

(2) This Act binds the Crown.

ANNEX D

Advice NI

Asbestos Support – Northern Ireland

Association of British Insurers

Association of Personal Injury Lawyers

Association of Independent Advice Centres

AXA Insurance

Bar Council

British Medical Association

Chief Medical Officer

Confederation of British Industry

Citizens Advice Bureaux

Construction Employers' Federation

District Councils

Dr Richard Shepherd

Education and Library Boards

Engineering Employers Federation

Equality Commission

FDA

Federation of Small Businesses

GMB

Health and Social Services Trusts

Health and Social Services Boards

Health and Social Services Councils

Her Majesty's Council of County Court Judges

Housing Executive

Irish Congress of Trade Unions

Justice for Asbestos Victims

Law Centre

Law Society of Northern Ireland

Lord Chief Justice of Northern Ireland

Members of the Legislative Assembly (MLAs)

NIPSA

NICVA

Northern Ireland Court Service

Northern Ireland Legal Services Commission

Northern Ireland Members of Parliament (MPs)

Northern Ireland members of the House of Lords

Professor Tony Newman-Taylor

Queen's University Belfast

Solicitors Associations throughout Northern Ireland

Transport and General Workers Union

UNISON

UNITE

University of Ulster